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No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

JEROME J. NASH,
Appellant,

VS.

CITY OF SANTA MONICA, et al.,
Appellees.

On Appeal From Supreme Court of The State Of California

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether a city may compel a landlord to remain in business against his will, with the only alternative being a forced sale.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the California Supreme Court (App. A, infra) reversing the judgment of the Superior Court is reported at 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984). The opinion of the California Court of Appeal (App. B, infra) affirming the judgment of the Superior Court was filed on May 25, 1983 and was reported at 143 Cal. App. 3d 251, 191 Cal. Rptr. 717 (1983) until vacated by the California Supreme Court. The findings and judgment of the California Superior Court (App. C, infra) were entered on June 20, 1980 and July 11, 1980, respectively, and are unreported.

JURISDICTION

The decision of the California Supreme Court upholding the validity of the challenged provision of the Santa Monica City Charter was entered on October 25, 1984. A notice of appeal to the California Supreme Court (App. D, infra) was filed on December 24, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law . . .

The Thirteenth Amendment to the United States Constitution provides in pertinent part:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States . . .

The Fifth Amendment to the United States Constitution provides in pertinent part:

> . . . nor shall private property be taken for public use, without just compensation.

STATUTES AND ORDINANCES INVOLVED

Santa Monica City Charter, Article XVIII (as originally adopted on April 10, 1979 (App. E, infra), and as revised on November 6, 1984 (App. F, infra))

STATEMENT

A.

The Elements Of The Challenged Santa Monica Law.

On April 10, 1979, the electorate of the City of Santa Monica voted to add Article XVIII to the Santa Monica City Charter (hereinafter referred to as the "Rent Control Law") (App. E, infra). In addition to controls on residential rents and the establishment of the Santa Monica Rent Control Board (hereinafter the "Board"), the Law also (1) prohibits the termination of tenancies except for enumerated "good cause" reasons (See, Section 1806 of the Rent Control Law, App. E, F, infra), and (2) requires each owner to continue to rent his property to existing tenants unless the owner obtains a "removal permit" from the Board[1] (See Sections 1806, 1803(t)[2]). Any violation of the Rent Control Law is a misdemeanor (Section 1810). The Law was revised and readopted by the electorate on November 6, 1984 (App. F, infra), but the revisions do not affect the substance of this action.

The combined effect of the Rent Control Law's limitations on eviction and its prohibitions against removing any property from rental use is to force all landlords to continue indefinitely renting their properties to the existing tenants. Tenants enjoy virtual life estates at controlled rent levels since they may not be evicted when their leases expire or when the owner wishes to cease operating his property for rental purposes. An owner's only escape is to find a buyer willing to assume these

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[1]Although "removal permits" are theoretically available, as a practical matter such permits are virtually impossible to obtain under the stringent restrictions imposed on their issuance by the Rent Control Law (Section 1803(t), App. E, F, infra).

[2]Unless otherwise indicated, all section references are to the Rent Control Law (App. E, F, infra).

continuing rental obligations and to sell for whatever that buyer is willing to pay.

B.

Factual And Procedural Background.

Over a year before the adoption of the Rent Control Law, Appellant Jerome J. Nash purchased a six-unit apartment building in Santa Monica. Shortly after the enactment of the Rent Control Law, Mr. Nash decided that he wanted to stop being a landlord, empty the building and hold onto the property. He was prevented from accomplishing this by the Rent Control Law.

Mr. Nash initially filed an application for a removal permit with the Board. However, he subsequently withdrew his application and filed this action in the California Superior Court, stipulating that he would be unable to qualify for a removal permit under the Rent Control Law.

On July 11, 1980, the Superior Court entered judgment in favor of Mr. Nash on several grounds: (1) that the refusal to permit Mr. Nash "to terminate his [apartment rental] Business and demolish the Building violates the interdiction against the deprivation of property without due process of law contained in the Fourteenth Amendment to the Constitution of the United States and Article 1, Section 7(a) of the California Constitution;" (2) that the Rent Control Law "violates the interdiction against the taking of private property for public use without just compensation contained in both the Fifth Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment to the Constitution of the United States, and Article 1, Section 19 of the California Constitution;" and (3) that Mr. Nash was "constitutionally entitled not to be compelled to sell the Building as the only means of terminating his Business

and removing himself and his property from under the Board's regulatory jurisdiction." (App. C, infra, at 6, 7)

The Superior Court also held that Mr. Nash was "not required further to exhaust his administrative remedies, as there is no adequate administrative remedy available to Petitioner which would entitle him to terminate his Business and demolish the Building." (*Id.*)

On May 25, 1983, the California Court of Appeal affirmed the Superior Court's judgment, holding (1) that "[t]here exists an undefined yet real notion of freedom which is violated by the idea of compelling an individual to work in a given business," (2) that the effect of the eviction and removal provisions of the Rent Control Law impinges upon the individual landlord's right to go out of business, (3) that the right to go out of business is protected from unjustified interference through strict scrutiny review by the courts, (4) that such strict scrutiny requires the Rent Control Law to be justified by a "compelling state interest" and "to be narrowly drawn to express only the legitimate state interests at stake," and (5) that the Rent Control Law is neither narrowly drawn nor justified by such a "compelling state interest" as to outweigh the strong burden imposed by the Law on landlords' personal freedom. (App. B, infra, at 4-11)

After granting the City's Petition for Hearing, the California Supreme Court reversed the judgments of the Superior Court and Court of Appeal. While recognizing that the right to go out of business is protected by the Thirteenth Amendment [App. A, infra, at 6], the court nonetheless held that "the indirect and minimal burden imposed upon Nash's asserted liberty interest by the [Rent Control Law] does not warrant departure from the traditional tests used to determine the validity of economic regulation." Using the "rational relationship" test,

the court upheld the Rent Control Law. (App. A, infra, at 8, 15-16)

The dissenting opinion in the California Supreme Court viewed the underlying issue differently, stating:

> In this case if the question is whether a municipality may exercise its police power to reasonably regulate the rental business, the answer is: generally it may do so. But if the question is whether a city may compel a landlord to remain in business against his will, and give him only the alternative of a forced sale, the answer is: not in a democratic society.

(App. A, infra, at 20)

THE QUESTION IS SUBSTANTIAL

A.

An Owner Of Residential Rental Property Is In The Business Of Being A Landlord.

Under California law a landlord is in the business of owning and operating residential rental property. The common law concepts of the landlord-tenant relationship have given way to modern contract and tort theories with substantial personal and financial obligations imposed by law on the landlord. Legally, the landlord now stands in essentially the same shoes as any other commercial businessman.

> Our approach to the common law of landlord and tenant ought to be aided by principles derived from the consumer protection cases referred to above. In a lease contract, a tenant seeks to purchase from his landlord shelter for a specified period of time. The landlord sells housing as a commercial businessman and has much greater opportunity, incentive and capacity to inspect and maintain the condition of his

> building. Moreover, the tenant must rely upon the skill and bona fides of his landlord at least as much as a car buyer must rely upon the car manufacturer. In dealing with major problems, such as heating, plumbing, electrical or structural defects, the tenant's position corresponds precisely with "the ordinary consumer who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles, and to decide for himself whether they are reasonably fit for the designed purpose."

Javins v. First National Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir. 1970)

These concepts have been adopted and expanded by the California courts. *Green v. Superior Court,* 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168 (1974). *See also, Knight v. Hallsthammar,* 29 Cal. 3d 46, 171 Cal. Rptr. 707, 623 P.2d 268 (1981) (holding that a warranty of habitability will be implied in every rental agreement and cannot be waived, even if the condition is known to the tenant); *Stoiber v. Honeychuck,* 101 Cal. App. 3d 903, 162 Cal. Rptr. 194 (1980) (holding that a landlord may be liable not only for property damage suffered by tenant because of breach of warranty of habitability, but also liable for intentional infliction of emotional distress); *Smith v. David,* 120 Cal. App. 3d 101, 176 Cal. Rptr. 112 (1981) (holding that breach of warranty of habitability may be a basis for the imposition of punitive damages).

Similarly, landlords' liabilities under tort theories have evolved away from the traditional concepts, with numerous new duties and obligations imposed by law. *Kline v. 1500 Massachusetts Avenue Apartment Corp.,* 439 F.2d 477 (D.C. Cir. 1970). These concepts too have been adopted and expanded by the California courts. *See, e.g.,*

Kwaitkowski v. Superior Trading Co., 123 Cal. App. 3d 324, 176 Cal. Rptr. 494 (1981) (holding that a landlord may be liable for rape that occurred on premises); *O'Hara v. Western Seven Trees Corp.,* 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977) (holding that a landlord may be liable for both compensatory and punitive damages for rape that occurred in tenant's apartment); *Uccello v. Laudenslayer,* 44 Cal. App. 3d 504, 118 Cal. Rptr. 741 (1975) (holding that landlord may be liable for personal injuries sustained when tenant's dog bit tenant's invitee); *People v. Green,* 264 Cal. App. 2d 774, 70 Cal. Rptr. 818 (1968) (holding that a landowner may be subject to prosecution for condition on property not of his own making).

The foregoing cases demonstrate the extent of the duties and responsibilities of every landlord. As recognized by Justice Mosk in his dissent below,

> Thus when the city compels one to remain a landlord against his will, it is not merely freezing an investment, it is requiring him to perform constant personal services.

App. A, infra, at 24.

It is the landlord who must ensure the safety and security of the premises. It is the landlord who must inspect for defects and make all necessary repairs. It is the landlord who bears the ultimate responsibility for being available twenty-four hours a day to render emergency repairs. While some of these responsibilities may be delegated to a manager, handyman, or management company, the landlord nonetheless remains civilly and criminally liable for their performance. Even insurance, if available and affordable, will not protect the landlord from criminal prosecution or civil punitive damages.

B.

Section 1803(t) Is Unconstitutional.

1. Private Citizens May Not Constitutionally Be Required To Continue In Business.

As recognized by the California court below, an individual has a constitutional right not to be forced unwillingly to continue in a given business. In the instant case, Mr. Nash has never agreed to assume the duties and obligations of being a landlord beyond the term of his tenants' leases, all of which have long since expired. He now wishes to be released from these duties and obligations. Yet, under the threat of criminal sanctions, he is forced to continue bearing them. Such forced service is an infringement of his personal liberty in violation of the Thirteenth and Fourteenth Amendments.

2. Private Citizens May Not Constitutionally Be Required To Sell Their Property To Other Private Citizens Without Assurance Of Receipt Of Fair Value.

The California court below suggested that owners of rental properties in Santa Monica do have an escape hatch — they may sell their properties. (App. A, infra, at 7) Yet this alleged escape hatch is itself a denial of the owners' constitutional rights. Even if Santa Monica could have constitutionally required one private citizen to sell his or her property directly to another private citizen — a proposition for which there is no legal precedent — due process of law requires, at a minimum, ordinary protections to ensure receipt of fair value, such as those utilized where a governmental agency exercises its right of eminent domain. *Bailey v. Anderson*, 326 U.S. 203, 205 (1945); *Bragg v. Weaver*, 251 U.S. 57, 59 (1919). Thus, a law which would require direct sales of property from

one private party to another private party without including protections to ensure receipt of fair value would be a violation of the Fifth and Fourteenth Amendments to the United States Constitution.

3. A Government Cannot Force A Citizen To Surrender One Constitutional Right In Order To Exercise Another Constitutional Right.

In its decision, the California Supreme Court has held that it is constitutional for a municipality to force a private citizen either to forego his constitutional right to go out of business, or to forego his Fifth and Fourteenth Amendment property rights. As observed by the dissent below,

> The city's theory is deceptively simple: "Once a landlord, always a landlord — or sell the property." The contention is, in effect, that the property owner has a duty to relieve the municipality of its invalid order by disposing himself of his property. Or to put it another way: persons who do not choose to abjectly submit to the city violating their fundamental rights should get out of town.

App. A, infra, at 21-22. Surely, where a government cannot directly impose either of two burdens on its citizens, it cannot cure the defects by compelling its citizens to choose between the two constitutional deprivations.

C.

The Decision Of The California Court Is Not Mandated By Previous Decisions Of This Court.

The California Supreme Court held that its decision was supported, and even required, by previous decisions of this Court, citing *Fresh Pond Shopping Center, Inc. v.*

Callahan, __U.S. __, 104 S.Ct. 218 (1983); *Hawaii Housing Authority v. Midkiff*, __ U.S. __, 104 S.Ct. 2321 (1984); and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

Fresh Pond Shopping Center, Inc. v. Callahan involved a due process challenge to a related ordinance adopted by the City of Cambridge, Massachusetts. In that case, the petitioner had acquired rental property with the intent of demolishing the structure and utilizing the land for additional parking for an adjoining shopping center. When the Cambridge Rent Control Board refused to grant a removal permit for this change in use, the petitioner brought suit, contending that the refusal constituted a taking of its property under the holding of this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Unfortunately, the facts and holding of the *Fresh Pond* case may be gleaned only from Justice Rehnquist's dissent from this Court's dismissal of the appeal for want of a substantial federal question. The Massachusetts trial court published no opinion and the Massachusetts Supreme Court summarily affirmed the judgment by a tie vote (446 N.E.2d 1060) without written opinion. It would appear, for example, that the complaint of the petitioner in *Fresh Pond* was not its forced continuation as a landlord, but the denial of its request to use the property for a parking lot. However, whatever may have been the actual facts of that case and whatever may have been the reasons this Court dismissed the appeal, *Fresh Pond* differs from the present case in that Mr. Nash is herein contending that it is his personal freedom, as well as his property rights, that have been abridged.

In *Hawaii Housing Authority v. Midkiff*, this Court upheld a law which permitted the State of Hawaii to exercise its power of eminent domain to acquire for fair value certain properties for the purpose of reselling the

properties to the existing occupants. This Court held that the public acquisition of such properties for this purpose constituted a public purpose within the meaning of the Fifth and Fourteenth Amendments. In the instant case, it is undenied and uncontested that the availability of rental housing serves a public purpose. Mr. Nash has never opposed the City of Santa Monica's use of its power of eminent domain to acquire his property for its fair value. But the City has never offered to do this. Instead, the City of Santa Monica has used its criminal laws to press Mr. Nash into public service or, alternatively, force him to sell his property.

In *Penn Central Transportation Co. v. New York City*, this Court upheld a decision by the New York Landmarks Commission denying Penn Central's request to build a forty-story office building on top of Grand Central Station. There was no suggestion in that case that Penn Central wished to abandon Grand Central Station and to cease engaging in the business of running a railroad. Nor is there any suggestion in the present case that Mr. Nash's six-unit building has the slightest historical or architectural value.

Rather than support the City of Santa Monica's theory that a government can require landlords to either remain in business or bail out for whatever they can salvage, this Court has previously expressed great concern over the concept that a person or entity can be forced to remain in a given business. In *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), this Court considered the conflict among the federal circuit courts as to whether a bona-fide cessation of business might constitute a violation of the federal labor laws. This Court held that the labor laws simply were not intended to apply to such circumstances.

> A proposition that a single businessman cannot choose a go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent. . . . We find neither.

Id. at 270. Quoting from *Labor Board v. New Madrid Mfg. Co.,* 215 F.2d 908, 914 (8th Cir. 1954), this Court also stated:

> But none of this can be taken to mean that an employer does not have the absolute right, at all times, to permanently close and go out of business . . . for whatever reason he may choose.

Textile Workers Union v. Darlington Mfg. Co., supra, at 271.

Considering the question directly with respect to the business of being a landlord, in *Robinson v. Diamond Housing Corp.,* 463 F.2d 853, 867 (D.C. Cir. 1972), Judge J. Skelly Wright stated:

> None of this is to say that the landlord may not go out of business entirely if he wishes to do so or that the jury is authorized to inspect his motives if he chooses to commit economic harakiri. There would be severe constitutional problems with a rule of law which required an entrepreneur to remain in business against his will.

D.

The Nash Decision Is Not Restricted To Landlord-Tenant Relationships.

The impact of the California court's decision is not limited to rental properties in rent controlled jurisdictions. With the demise of the feudal concepts of landlord-

tenant law, the landlord is no longer significantly different from the grocer using his property to sell groceries, the manufacturer using his plant, or the doctor using his office. Each utilizes his property — whether real or personal, tangible or intangible — to engage in a business in which he undertakes certain contractual obligations and provides certain personal services for his customers. Each of these businesses serves a public purpose and each is subject to reasonable governmental regulation.

While the California court has held that local governments may use their powers of eminent domain to retain such private businesses[3], the *Nash* decision goes far beyond this, permitting a local government to achieve the goal of forcibly retaining private businesses without having to resort to its powers of eminent domain. Under the *Nash* decision, a city may avoid condemnation and payment of fair value by using the expediency of its criminal laws to require owners of private enterprises to continue in business, permitting only the alternative of a forced sale to some other private person willing to continue the enterprise. Here, there are no procedural protections provided for the owners. There are no public hearings. There are neither guarantees of receipt of fair value nor provisions for judicial review. The California decision in this case presents an attractive alternative for any city that wishes to retain a private business enterprise using a shorter cut than the constitutional way of paying for it.

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[3] In *City of Oakland v. Oakland Raiders,* 32 Cal.3d 60, 183 Cal. Rptr. 673, 646 P.2d 835 (1982), the California Supreme Court upheld the City of Oakland's authority to assert its power of eminent domain to attempt an acquisition of a professional football team that wanted to move to Los Angeles.

CONCLUSION

Probable jurisdiction should be noted.

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APPENDIX A

APPENDIX A

In the Supreme Court of the State of California.

Jerome J. Nash, Plaintiff and Respondent, v. City of Santa Monica et al., Defendants and Appellants. L.A. 31798 (Super. Ct. No. C311502).

Filed: Oct. 25, 1984.

In this case we are called upon to determine the validity of Santa Monica City Charter section 1803, subdivision (t) — which prohibits removal of rental units from the housing market by conversion or demolition absent a removal permit from the Santa Monica Rent Control Board — as it applies to prevent the owner of an apartment building from evicting his tenants and tearing the building down. The trial court held that the ordinance, as so applied, constitutes a deprivation of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution and article I, section 7, subdivision (a) of the California Constitution.

As is so often the case in constitutional litigation, the issues appear different depending upon one's perspective. For Santa Monica, the challenged provision is nothing more than a land use regulation designed to effectuate the purposes of the city's rent control ordinance of which it is a part, while Nash views it as a means of forcing him to remain a landlord despite his wish to "go out of business" — an interest which he asserts is among the "basic values 'implicit in the concept of ordered liberty.' [Citations.]" (City of Carmel-By-The-Sea v. Young (1970) 2 Cal. 3d 259, 266). There is a degree of merit in both perspectives, but neither is adequate to resolve the issue presented. Rather, as we shall explain, what is required is a realistic

appraisal of the impact of the challenged provision upon Nash and the alternatives available to him, on one hand, and of the relationship of that provision to the objectives of the rent control ordinance, on the other. On the basis of that appraisal, we will conclude that while the challenged provision may be said to implicate interests which are entitled to a high degree of constitutional protection — including one's choice whether to remain in a particular business or occupation — the actual limitation upon those interests posed by the challenged provision is minimal and not significantly different from other, constitutionally permissible, limitations upon the use of private property imposed by government regulation. At the same time, the provision, by protecting existing tenants against eviction and the scarce supply of residential housing in Santa Monica against further erosion, clearly serves important public objectives. Consistent with the settled precedent of this court, and the United States Supreme Court, we shall hold that section 1803, subdivision (t), is not constitutionally infirm.

I.

The vacancy rate for rental housing in Santa Monica was, at the time of trial, approximately 1.7 percent. In the late 1970s, the city was confronted with a severe shortage of its traditionally scarce housing stock, precipitated in large measure by what came to be known as the "Demolition Derby." This term was coined to describe a 15-month period during which Santa Monica landlords razed over 1,300 rental units and converted hundreds of other such

units into condominiums. Rental housing units were removed from the market at 10 times the rate of removals (relative to population) of neighboring Los Angeles.[1]

In 1979, the citizens of Santa Monica by initiative added article XVIII to the city's charter. This new article provided for a rent control board with the authority to set and adjust maximum rents and to control the removal of rental units from the housing market. (§ 1803.)[2] The rent control law also regulates tenant evictions. (§ 1806.) Section 1803, subdivision (t)[3] of the rent control law

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[1]City of Santa Monica, Housing Element Technical Report (Jan. 1981) at pages 54, 142, 233.

[2]Unless otherwise indicated all section references are to Santa Monica City Charter, article XVIII.

[3]Section 1803, subdivision (t) provides as follows: "(t) REMOVAL OF CONTROLLED RENTAL UNIT FROM RENTAL HOUSING MARKET: Any landlord who desires to remove a controlled rental unit from the rental housing market by demolition, conversion or other means is required to obtain a permit from the Board prior to such removal from the rental housing market in accordance with the rules and regulations promulgated by the Board. In order to approve such a permit, the Board is required to make each of the following findings; [¶] (1) That the controlled rental unit is not occupied by a person or family of very low income, low income or moderate income. [¶] (2) That the rent of the controlled rental unit is not at a level affordable by a person or family of very low income, low income, or moderate income. [¶] (3) That the removal of the controlled rental unit will not adversely affect the supply of housing in the City of Santa Monica. [¶] (4) That the landlord cannot make a fair return on investment by retaining the controlled rental unit. [¶] Notwithstanding the foregoing provisions of this subsection, the Board may approve such a permit: [¶] (1) If the Board finds that the controlled rental unit is uninhabitable and is incapable of being made habitable in an economically feasible manner, or [¶] (2) if the permit is being sought so that the property may be developed with multifamily dwelling units and the permit applicant agrees as a condition of approval that the units will not be exempt from the provisions of this Article pursuant to Section 1801(c) and that at

requires a landlord to obtain a permit before demolishing a building. Where the landlord both owns habitable property and does not wish to rebuild, a demolition permit will be granted only upon a finding that (1) the building is not occupied by persons of low or moderate income, (2) cannot be afforded by persons of low or moderate income, (3) removal will not adversely affect the housing supply and (4) the owner cannot make a reasonable return on his investment.

Respondent Nash was a 17-year-old student when, approximately a year before the rent and demolition controls were enacted, his mother obtained on his behalf a $260,000 apartment building in Santa Monica.[4] He soon became disenchanted, however, with operating rental housing:

> "There is only one thing I want to do, and that is to evict the group of ingrates inhabiting my units, tear down the building, and hold on to the land until I can sell it at a price which will not mean a ruinous loss on my investment."

Nash began the process of filing for a removal permit, so that he might indeed destroy the building and allow the land to appreciate in value. Because he concededly could earn a fair return on his investment, however, it soon became clear to him that he would not be issued the permit. Thus, rather than complete the statutorily mandated, but probably, for him, futile removal permit application process, Nash sought to circumvent the regulations by filing a petition for writ of mandate in Los Angeles Superior Court.

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least fifteen (15) per cent of the controlled rental units to be built on the site will be at rents affordable by persons of low income."

[4]The apartment became respondent's when he reached the age of majority.

At trial, Nash admitted that if the apartment were left standing and remained occupied, he could earn a fair return on his investment in the property. He further conceded that demolition of his building would adversely affect the supply of housing in Santa Monica. The court found the units in Nash's building were occupied by persons of very low, low, or moderate income, and that the rents charged were affordable by them. Thus, the trial court found the prerequisites to the acquisition of a demolition permit had not been satisfied.

Based on these findings, the trial court accepted Nash's argument that the challenged provision operated to deprive Nash of property without due process of law. It also declared, *sua sponte,* that the provision resulted in a taking of his property without just compensation. It ordered a writ of mandate issue commanding the City of Santa Monica and the Santa Monica Rent Control Board to grant Nash a removal permit for his property.

II.

We begin by examining the nature of Nash's claim. Notwithstanding the trial court's alternative ruling, Nash expressly disclaims any contention that the city's ordinance effects a "taking" of his property in violation of federal or state Constitutions. Nor, in light of applicable authority, would such a claim appear to have merit. In Penn Central Transp. Co. v. New York City (1978) 438 U.S. 104, the United States Supreme Court considered a constitutional challenge to New York City's Landmark Preservation Law, which authorizes a city commission to prohibit the demolition of designated historic structures. The court held that no taking was involved in application of the ordinance to plaintiff, which desired to tear down Penn Central Station and erect an office building in its place, since the regulation did not interfere with the

owner's "primary, investment-backed expectations," and did not render the owner unable to receive a reasonable return on his investment. (*Id.,* at p. 136; see also Maher v. City of New Orleans (5th Cir. 1975) 516 F.2d 1051, cert. den. (1976) 426 U.S. 905.) It is undisputed that both prongs of the *Penn Central* test are met here. We are aware of no authority which would impose different requirements under the California Constitution. (See Agins v. City of Tiburon (1979) 24 Cal.3d 266, 277, affd. 447 U.S. 255.)

Nash asserts that he is "not seeking compensation from the City of Santa Monica for being forced to stay in the apartment-rental business, but only the right to go out of that business." Conceding that there are no decisions precisely in point, and without identifying any particular constitutional provision, Nash contends that there must be limitations upon the power of the state to compel a person to pursue a particular business or occupation against his will.

We agree. The Thirteenth Amendment to the United States Constitution prohibits involuntary servitude. This court has spoken of the basic liberty to pursue and obtain happiness by engaging in the common occupations of the community. (See Sail'er Inn, Inc. v. Kirby (1971) 5 Cal.3d 1, 17.) The exercise of state power to force upon an individual a career chosen by the state would surely raise substantial questions of constitutional dimension.

The City of Santa Monica has not done that to Nash, however. Rather, it has told him that so long as tenants remain in his apartment units, and so long as he continues to receive a fair rate of return on his investment, he may not evict them and demolish the building. Nash remains free to minimize his personal involvement by delegating responsibility for rent collection and maintenance to a property manager. He remains free under the

ordinance to withhold rental units from the market as they become vacant. And, he remains free to sell his property and invest the proceeds elsewhere. The problem arises from the fact that Nash prefers to do none of these things, but to demolish the building and keep the land beneath as an investment. This he claims an absolute right to do, as owner of the property.

The state Constitution protects the rights of "acquiring, possessing, and protecting property . . ." (Cal. Const., art. I, § 1.) Both federal and state Constitutions protect against deprivation of property without due process of law. Yet, "[i]t is thoroughly established in this country that the rights preserved to the individual by these constitutional provisions are held in subordination to the rights of society. Although one owns property, he may not do with it as he pleases any more than he may act in accordance with his personal desires." (Miller v. Board of Public Works (1925) 195 Cal. 477, 488.) Thus, an ordinance restrictive of property use will be upheld, against due process attack, unless its provisions "are clearly arbitrary and unreasonable, having no substantial relation to the general health, safety, morals, or general welfare." (Village of Euclid v. Ambler Realty Co. (1926) 272 U.S. 365, 395.)

Nash seeks to elevate the standard of constitutional review from the "rational relationship" test normally used in appraising the validity of property regulation to a more restrictive "strict scrutiny" test, on the ground that the Santa Monica ordinance implicates his "fundamental right" to cease doing business as a landlord. His argument is that the city has conditioned the exercise of that "fundamental right" upon the relinquishment of his right not to sell his property, and that this is constitutionally impermissible, absent a compelling governmental interest which, he asserts, does not exist.

Even were we to accept Nash's theory we would be hard pressed to say that there is no compelling governmental interest in the preservation of scarce rental housing against destruction.[5] Chief Justice Bird's opinion presents a cogent argument that on the facts of this case the governmental interest is compelling indeed.

We find it unnecessary to reach that level of analysis, however, since in our view the indirect and minimal burden imposed upon Nash's asserted liberty interest by the demolition control provisions of the Santa Monica ordinance does not warrant departure from the traditonal tests used to determine the validity of economic regulation. (See Associated Home Builders v. City of Livermore (1976) 18 Cal.3d 582, 602; Village of Belle Terre v. Boraas (1974) 416 U.S. 1, 8.; cf. City of Santa Barbara v. Adamson (1980) 27 Cal.3d 123.) All regulation of property entails some limitation upon the liberty of the owner; and, to the extent that the regulation limits the

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[5]Santa Monica is not alone in its view that demolition controls are required to preserve rental housing. (See Groch v. City of Berkeley (1981) 118 Cal.App.3d 518, 521, fn. 1 [upholding, against attack for vagueness, a similar antidemolition ordinance which required a finding that "demolition would not be materially detrimental to the housing needs and public interest of the affected neighborhood and the City of Berkeley"].) Under recent state legislation, the conversion or demolition of existing residential dwelling units occupied by persons and families of low or moderate income within the coastal zone (as defined in Pub. Resources Code, § 30000 et seq.) is not authorized unless provision has been made for the replacement of such dwelling units with units for persons and families of low or moderate income. (Gov. Code, § 65590.) (See also Flynn v. City of Cambridge (Mass. 1981) 418 N.E.2d 335, 338-339 ["If the power to control rents is to be anything more than an interim measure effective for only the short period needed to convert the entire rental housing stock, it must include by implication the power to make reasonable regulations governing removals from the rental housing market"].)

uses to which the property may be put, it entails limitation upon the owner's liberty to pursue his chosen occupation or business at that location. If the owner wishes to pursue his preference, he may be constrained to sell his property and move elsewhere. If the value of his property has decreased as a result of the regulation, he may perceive that to be an undesirable alternative, and to that extent feel economically constrained to continue in his present field of endeavor. Yet, the existence of these legal and de facto limitations upon his freedom of choice do not operate to subject the property regulation to a strict scrutiny test, under modern legal principles. (See Agins v. City of Tiburon (1979) 24 Cal.3d 266, 277, affd. 447 U.S. 255.)

The strict scrutiny standard which Nash invokes would call into question a variety of land use regulations which have thus far withstood constitutional attack. Ordinances which prohibit demolition of historic monuments, such as the one upheld in Penn Central Transp. Co. v. New York City, supra, 438 U.S. 104, not only limit the freedom of choice of the owner as to the use of his property, and as to the type of business or occupation he may engage in upon the premises, but also impose upon the owner, as a minimal duty which he cannot legally escape without sale, the obligation to maintain the premises in a state of repair. (*Id.,* at p. 111; *Maher,* supra, 516 F.2d at p. 1066, fn. 85; see also Figarsky v. Historic District Commission (1976) 171 Conn. 198 [368 A.2d 163] [upholding an order denying permission to demolish a building and requiring certain repairs instead].)

In the arena of landlord-tenant law, demolition controls may be viewed as an adjunct to limitations upon eviction which have generally been upheld by the courts (see Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129, 148). Such limitations, depending upon the context, may

similarly inhibit an owner's desire to curtail his function as landlord. (See, e.g., Grace v. Town of Brookline (Mass. 1979) 399 N.E.2d 1038, 1046 [upholding prohibition against eviction in condominium conversion cases even though they "limit[ed] the property owners' right to remove units from the rental market"]; Puttrich v. Smith (N.J.App.Div. 1979) 407 A.2d 842, 843 [upholding prohibition against conversion to personal use, on grounds "the legislature could constitutionally decide . . . that an owner's right to utilize his property must yield to a tenant's interest in keeping his home"]; see also, Stamboulos v. McKee (N.J.App.Div. 1975) 342 A.2d 529; Loeterman v. Town of Brookline (D.Mass. 1981) 524 F.Supp. 1325.)

Nash is not being called upon to operate a business or engage in a profession unrelated to the property; his landlordly obligations are those which arise out of the ownership of the sort of property which he acquired. As Justice Holmes said, in rejecting a Thirteenth Amendment attack by a landlord upon an ordinance which made it a misdemeanor to fail to furnish certain services to tenants:

> "It is true that the traditions of our law are opposed to compelling a man to perform strictly personal services against his will even when he has contracted to render them. But the services in question ['water, heat, light, elevator, telephone, or other services as may be required by the terms of the lease and necessary to the proper or customary use of the building'] although involving some activities are so far from personal that they constitute the universal and necessary incidents of modern apartment houses. They are analogous to the services that in the old law might issue out of or be attached to the land." (Marcus Brown Holding Co., Inc. v. Feldman

(1921) 256 U.S. 170, 199; accord, Marquam Investment Corp. v. Beers (Ore.App. 1980) 615 P.2d 1064.)

Finally, insofar as Nash feels constrained by the ordinance to sell his property rather than undertake other alternatives available to him (*ante,* p. ____*), he is in no worse position than if the City of Santa Monica were to exercise its power of eminent domain to compel a sale to private parties — a procedure recently upheld in a unanimous decision by the United States Supreme Court. (Hawaii Housing Authority v. Midkiff (1984) __ U.S. __ [52 U.S.L.Week 4673].) Indeed, he is in a better position, since he retains the option of continuing to own the property and to operate it at what he concedes to be a fair rate of return. Thus, Nash's argument that the ordinance unconstitutionally impinges upon his right to retain property rather than to sell it simply does not hold water.[6]

In support of his attack upon section 1803, subdivision (t), Nash relies upon snippets of dicta from opinions which, upon close analysis, are seen to have scant bearing

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*Typed opinion at page 5.

[6]Nash does not suggest that the parcel which he now owns in Santa Monica has some personal or sentimental value to him which distinguishes it from other property which Nash might purchase with the proceeds. Nash has not lived in any of the apartments, and his plans for the property do not include any personal use. Rather he has held the property, and plans to hold it, in the manner typical of personal or corporate investors in real estate, i.e., purely as a form of economic investment. To the extent that selling his property is Nash's only alternative to remaining in business as a landlord, the resulting detriment, if any, can only be economic in nature.

Nash contends, and we assume, that the value of his property in the market place is adversely affected by rent control. It is quite clear, however, that the adverse economic effects of land use regulation do not give rise to a constitutional claim so long as the property retains value. (Agins v. City of Tiburon, supra, 24 Cal.3d 266.)

upon the issue. In Bowles v. Willingham (1944) 321 U.S. 503, for example, in which the Supreme Court upheld the rent control provisions of the Emergency Price Control Act of 1942, the court made reference to the fact that the statute "provided that '. . . [it] shall [not] be construed to require any person to sell any commodity or to offer any accommodations for rent.' " (*Id.*, at p. 517.) Nash suggests that but for this provision the statute would have been unconstitutional, but that is quite clearly not what the opinion says. The federal statute — unlike the Santa Monica ordinance — established maximum rentals for classes of dwellings, without regard to the situations of individual landlords. The portion of the opinion in which the quoted language appears discusses a contention that the statute could have the effect of requiring a particular landlord to remain in business even where the activity was producing less than a "fair return," and thus amounts to an invalid "taking." The court responded that since the statute contained an "opt-out" provision, that issue was not before the court. The entire discussion has no relevance to Nash, who concedes that he is receiving a fair return, and who asserts no "taking" claim.[7]

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[7] Nash relies also upon Textile Workers v. Darlington Co. (1965) 380 U.S. 263, which held that the National Labor Relations Act does not prohibit an employer, even for anti-union reasons, to go out of business entirely, and upon dicta in the opinion to the effect that the contrary proposition "would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent." (*Id.*, at p. 270.) Nothing in that opinion suggests that the contrary proposition would be unconstitutional, however, and in any event a rule prohibiting a landlord from demolishing a building is clearly of a quite different order from a rule which would require a textile manufacturer to continue manufacturing textiles. The Supreme Court's views as to the issue presented here are more accurately reflected in its opinion in *Penn Central*, supra, and in *Fresh Pond*, infra.

On the contrary, the one reported decision which *does* pass upon antidemolition controls similar to those contained in section 1803, subdivision (t) upholds their constitutionality against both taking and due process challenge. In Fresh Pond Shopping Center, Inc. v. Callahan (1983) ____ U.S. ____ [104 S.Ct. 218], the plaintiff had purchased property, on which an apartment house was situated, that was located next to a Sears department store. Fresh Pond owned the shopping center in which Sears was located, and leased land to Sears for a store and a parking area. Part of the parcel of land that had been leased to Sears had been taken by eminent domain, reducing the size of the Sears parking lot. In order to replace the lost parking spaces, and pursuant to its lease agreement, Fresh Pond purchased the adjacent property with the intention of demolishing the building and paving over the entire parcel.

At the same time, the City of Cambridge was on the verge of enacting an ordinance designed to preserve its supply of rent controlled housing. The ordinance included a provision which abolished the previous right of a Cambridge property owner to cease being a landlord by removing its property from the rental housing market. Under the ordinance, an owner who sought to remove property from housing use, and to evict a tenant in order

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Finally, Nash relies upon Robinson v. Diamond Housing Corp. (D.C.Cir. 1972) 463 F.2d 853, which upheld limitations upon the following dicta in that case: "None of this is to say that the landlord may not go out of business entirely if he wishes to do so or that the jury is authorized to inspect his motives if he chooses to commit economic harakiri. There would be severe constitutional problems with a rule of law which required an entrepreneur to remain in business against his will." (*Id.*, at p. 867.) The issue posed by the dicta was not presented in the case, however, nor was that issue considered in the context of an ordinance, such as Santa Monica's, aimed at preserving housing for low or moderate income tenants.

to effect this removal, first had to obtain a "removal permit" from the rent control board. If the board chose to deny the permit, the ordinance prohibited the removal and required the landlord to maintain the property as rental housing.

The purchase and sale agreement for the property at issue was executed in June 1979 before the enactment of the ordinance later challenged by Fresh Pond. The actual sale did not occur, however, until two days after the ordinance was enacted.

Within two months Fresh Pond was prepared to evict its new tenants and level the apartment in which they were living. The Company sought removal permits from the Cambridge Rent Control Board to vacate the building — only one of six apartments was actually occupied — and demolish it according to its original purpose.

The rent control board denied the applications. On appeal, the United States Supreme Court left standing the decision of the Massachusetts Supreme Judicial Court, which earlier had affirmed the rent control board's denial of Fresh Pond's applications for removal permits. While the United States Supreme Court dismissed the appeal of Fresh Pond for want of a substantial federal question, the issues presented by the facts of the case[8] were necessarily decided and the judgment has the force of binding precedent. As the sole dissenter from the judgment, Justice Rehnquist, wrote: "[The issues] might be postponed or avoided if the case were here on certiorari, but the case is an appeal; we act on the merits whatever we do." (____ U.S. at p. ____[104 S.Ct. at p. 218].) Thus, while Nash's contentions with respect to the California Constitution are left to this court for response,

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[8]These included both a takings and a due process challenge to the operation of the ordinance.

the United States Supreme Court has addressed the matter and found the assertion of the unconstitutionality of an ordinance nearly identical to Santa Monica's, by one in almost precisely Nash's position, unavailing for purposes of federal constitutional law. The views of Justice Rehnquist — that the Cambridge ordinance represented a "taking" without just compensation — were apparently rejected by his eight colleagues, and in any event form no part of Nash's contention here.

Turning to the California Constitution, we find no persuasive authority, in precedent or in logic, for a different result.[9] The applicable test requires that the regulation be "procedurally fair and reasonably related to a

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[9]Nash relies on dicta in Department of Public Works v. San Diego (1932) 122 Cal.App. 159, 166-167, that "[w]hile the police power may limit and restrict the uses to which an owner may put his property, it may not compel him to use such property for a particular purpose if he prefers to abandon such a use thereof." That case involved an original proceeding in mandate, brought by the state Department of Public Works and the state engineer under the Dam Act of 1929 (Stats. 1929, p. 1505) against the owner and lessee of a dam, to compel the respondents to reconstruct the dam and its buttresses in accordance with more recent principles of dam construction. The court held that the statute did not give the state officials authority "to compel either the rebuilding or the continued operation of such a dam." (*Id.*, at p. 165.) In the process of reaching that conclusion, the court suggested that a contrary interpretation "would, at least so far as the respondent company is concerned, be in violation of article I, section 14, of the Constitution of California and of the fourteenth amendment to the Constitution of the United States, as taking private property for public uses without compensation." (*Id.*, at p. 166.)

San Diego is clearly distinguishable on its facts. (People v. Greene (1968) 264 Cal.App.2d 774, 779.) Even on the facts of that case, the court's dicta concerning the taking of private property without compensation is dubious in light of cases like *Penn Central*, supra, 438 U.S. 104. Moreover, Nash asserts no takings claim here.

proper legislative goal. The wisdom of the legislation is not at issue in analyzing its constitutionality, and neither the availability of less drastic remedial alternatives nor the legislative failure to solve all related ills at once will invalidate a statute." (Hale v. Morgan (1978) 22 Cal.3d 388, 398.) Nash does not challenge the procedural fairness of the ordinance; and, as we have discussed (*ante,* p. __*), in the context of a land-use ordinance the requirement of section 1803, subdivision (t), that a predemolition removal permit must be obtained before a landlord may level his or her rental units is reasonably related to the legitimate goal of maintaining adequate rental housing for Santa Monica's citizens. There can be no doubt that the relationship of the ordinance to the public welfare is both "real and substantial." (Associated Home Builders v. City of Livermore, supra, 18 Cal.3d 582, 609.)

We conclude the questioned provision, as applied to respondent Nash is valid. Accordingly, we reverse the judgment below.

GRODIN, J.

WE CONCUR:

KAUS, J.
BROUSSARD, J.
REYNOSO, J.

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*Typed opinion at page 12.

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CONCURRING AND DISSENTING OPINION BY BIRD, C.J.

I concur in the result. However, I would rest the holding on somewhat different grounds.

The majority attempt to finesse Nash's personal liberty claim by concluding that the ordinance is essentially an economic regulation which affects Nash's ability to use his private property as he wishes, not his right to cease performing the duties of a landlord. (See maj. opn., *ante,* at pp. __-__*) In my view, this line of reasoning elevates formal logic over practical reality.

Prior to the enactment of demolition controls, Nash could have razed his building and used the property for something other than residential leasing. Now, he is reduced to the single option of selling the property. Clearly, the ordinance has made it more difficult to cease being a landlord.

In effect, the majority employ the distinction between "direct" and "indirect" burdens on constitutional rights as a means of avoiding Nash's personal liberty claim. This distinction obscures the actual impact of the challenged enactment. If the city had fined Nash one dollar for ceasing to be a landlord, the majority would have had no difficulty finding that the asserted personal liberty interest had been burdened. Practically, the ordinance imposes a far greater burden than a small fine. Nevertheless, since that burden is "indirect and minimal" (maj. opn., *ante,* at p. __**), the majority conclude that it

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*Typed maj. opn. at pp. 2, 8-10.

**Typed maj. opn. at p. 10.

does not warrant strict scrutiny. (See generally Committee to Defend Reproductive Rights v. Myers (1981) 29 Cal.3d 252, 288-290 (conc. opn. of Bird, C.J.).)

I would acknowledge that Nash's practical ability to cease being a landlord has been burdened. Further, inasmuch as the duties of a landlord necessarily involve the rendering of personal services, I agree with Justice Mosk that the right to cease being a landlord is constitutionally protected. (See dis. opn., *post,* at p. __.**) The freedom to withhold personal services is a corollary of the basic liberty to pursue and obtain happiness by engaging in the common occupations of the community. (See Sail'er Inn, Inc. v. Kirby (1971) 5 Cal.3d 1, 17.)[1]

However, applying strict judicial scrutiny, I have no difficulty finding that the ordinance was necessary to serve a compelling governmental objective. Housing is a basic necessity of life. The provision of housing for every California family is, in the words of the Legislature, "a priority of the highest order." (Gov. Code, § 65580, subd. (a).)

The demolition controls were enacted in response to a demonstrated propensity on the part of Santa Monica landlords to destroy rental housing units. During the so-

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**Typed dis. opn. at p. 7.

[1]For purposes of this discussion, I assume that Nash would, as a practical matter, have no alternative but to perform substantial personal services were he to continue in the apartment rental business. The record is not entirely clear on this point. Nash might have been able to avoid performing the services that were distasteful to him by, for example, placing his rental units in trust. However, in view of my conclusion that the ordinance passes constitutional muster under the standard of strict scrutiny, I find it unnecessary to delve further into this question.

called "Demolition Derby," landlords razed over 1,300 rental units in a 15-month period. The dissent's assertion that the city could have halted this march of destruction by less restrictive means is mere conjecture.

Further, the ordinance imposes only a minimal constraint on Nash's freedom. As the majority point out, he can escape from the landlord business by the simple expedient of selling his property or withholding rental units from the market as they become vacant. Nash does not contend that this particular piece of property is especially important to him or that a sale would harm his ability to provide for himself or his dependents. In short, the ordinance burdens Nash's right to withhold personal services only by limiting his ability to maximize the profits from his property. Though this is *a* burden, it is not an unduly harsh one in view of the city's compelling interest in providing housing for its residents.

Accordingly, I concur in the judgment.

BIRD, C. J.

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DISSENTING OPINION BY MOSK, J.

I dissent.

As Justice Frankfurter wrote in Bay Ridge Co. v. Aaron (1948) 334 U.S. 446, 484, "On the question you ask depends the answer you get."

In this case if the question is whether a municipality may exercise its police power to reasonably regulate the rental business, the answer is: generally it may do so. But if the question is whether a city may compel a landlord to remain in business against his will, and give him only the alternative of a forced sale, the answer is: not in a democratic society.

The majority primarily consider the former question. In my view the latter issue is relevant under the facts of this case. Thus our answers differ.

I begin with the disbelief of the United States Supreme Court that one may be prevented from going out of business. In Textile Workers v. Darlington Co. (1965) 380 U.S. 263, 270, Justice Harlan wrote for a unanimous court: "A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent . . . We find neither."

This is followed by the opinion of Judge J. Skelly Wright in Robinson v. Diamond Housing Corp. (D.C. Cir. 1972) 463 Fed.2d 853, 867: "None of this is to say that the landlord may not go out of business entirely if he wishes to do so or that the jury is authorized to inspect his motives if he chooses to commit economic harakiri.

There would be severe constitutional problems with a rule of law which required an entrepreneur to remain in business against his will."

Curiously the city relies on the district court opinion in Flood v. Kuhn (S.D.N.Y. 1970) 316 F.Supp. 271, 274, affd. 443 F.2d 264, affd. 407 U.S. 258, in which it was held that a baseball player is bound by his contractual obligations "subject only to his right to retire from baseball." Here the petitioner is bound by the city rent ordinance, but apparently not subject to his right to retire from the rental business.

The earliest modern instance of rent control was the wartime Emergency Price Control Act of 1942. Two years after its enactment, the United States Supreme Court held the act did not constitute a taking under the Fifth Amendment only because it "provided that it shall not be construed to require any person to sell any commodity or to offer any accommodations for rent." (Bowles v. Willingham (1944) 321 U.S. 503, 517.)

Section 1803, subdivision (t) of the Santa Monica ordinance is in conflict with *Bowles,* in that the landlord is required to maintain his property as "accommodations for rent" and to offer the rentals under the terms ordered by the city. He is not permitted to opt out.

The city suggests that the property owner may avoid its draconian order by the forced sale of his property to another who would in turn be compelled to continue in the rental business. Assuming arguendo that such a person could be found — a doubtful assumption under these circumstances — the city's rationale leaves much to be desired. The city's theory is deceptively simple: "Once a landlord, always a landlord — or sell the property." The contention is, in effect, that the property owner has a duty

to relieve the municipality of its invalid order by dispossessing himself of his property. Or to put it another way: persons who do not choose to abjectly submit to the city violating their fundamental rights should get out of town.

If the city forces this owner to involuntarily transfer his property to a third person, the result is no less a taking than if the municipality itself were to assume title to the property. Thus if the city insists upon its asserted public purpose of maintaining these six rental units ad infinitum, it must condemn the building and pay just compensation therefor. Neither the federal nor state Constitutions permit the city to achieve its purpose by impressing this owner and his property into the mold of a public utility bound in perpetuity to provide, maintain, and operate a housing business.

Contrary to the city's contention, cases involving historical landmarks are not relevant to the rights of a property owner of a strictly commercial structure that is of no known historical value.

The majority rely on Fresh Pond Shopping Center v. Callahan (1983) __ U.S. __ [104 S.Ct 218], a case that has produced no prevailing written opinion at any level. The trial court published no opinion, the Supreme Court of Massachusetts summarily affirmed the judgment by a tie vote (446 N.E.2d 1060), and the United States Supreme Court summarily dismissed a purported appeal for want of a substantial federal question. That scenario creates no persuasive, let alone binding, authority for anything.

The majority obtain the facts from the only opinion written in *Fresh Pond*: the dissent of Justice Rehnquist from the dismissal. But they ignore his conclusion: i.e., that he believes the rent control ordinance is the equivalent of "a physical occupation of the appellant's

property," which, pursuant to Loretto v. Teleprompter Manhattan CTAV Corp. (1982) 458 U.S. 419, constitutes a taking without just compensation.

Since the Supreme Court majority declared there is no substantial federal question in *Fresh Pond,* we are free, as was Massachusetts in that case, to decide the present issue entirely on the basis of state authority. I am convinced that although petitioner has not asserted a taking by the city, the implications of California Constitution, article I, section 1 and 19, cannot be avoided, and are controlling to prevent the arbitrary actions of the city herein. Also persuasive is Department of Public Works v. San Diego (1932) 122 Cal.App. 159, 169, in which an act was found to be within the city's police power, but its provisions "do not extend to the point where the owner . . . may be compelled to continue its operation or directly compelled to perform specific work which might be necessary to any such continuance."

The majority appear to adopt a simplistic view of the rental business, i.e., that it stems easily and inexorably from the ownership of property and involves a mere passive investment. Landlords undoubtedly wish that were so, but the realities of the economic world require them to perform numerous personal services and assume onerous obligations and serious potential liability. Indeed, under many circumstances that liability can be financially devastating. (See, e.g., Kwaitkowski v. Superior Trading Co. (1981) 123 Cal.App.3d 324, 329-332, and cases cited [landlord liable for rape that occurred on premises]; Stoiber v. Honeychuck (1980) 101 Cal.App.3d 903 [landlord liable for property damage suffered by tenant because of breach of warranty of habitability, and also liable for intentional infliction of emotional distress]; O'Hara v. Western Seven Trees Corp. (1977) 75 Cal.App.3d 798 [landlord liable for rape

that occurred in plaintiff's apartment]; Brennan v. Cockrell Investments Inc. (1973) 35 Cal.App.3d 796 [landlord must exercise ordinary care in management of premises, even those under tenant's control]; Evans v. Thompson (1977) 72 Cal.App.3d 978 [landlord liable for property damage from fire]; Golden v. Conway (1976) 55 Cal.App.3d 948, 960 [landlord strictly liable for property damage when premises equipped with an appliance that proves to be defective]; Uccello v. Laudenslayer (1975) 44 Cal.App.3d 504 [landlord liable for personal injuries received when tenant's dog bit an invitee of the tenant]; People v. Green (1968) 264 Cal.App.2d 774 [landlord subject to prosecution for nuisance for condition on property not of his own making].)

The foregoing cursory sampling of cases illustrates that being a landlord entails active and vigilant management. Thus when the city compels one to remain a landlord against his will, it is not merely freezing an investment, it is requiring him to perform constant personal services. Since 1865 involuntary personal service has been an anathema in a free society.

After relying on *Fresh Pond,* a case without a prevailing opinion, the majority seem to desperately seek some relevant authority; they therefore cite Hawaii Housing Authority v. Midkiff (1984) ____ U.S. ____. That Hawaiian landowners may have their property taken upon payment of just compensation is small comfort to this plaintiff who must remain a landlord under compulsion and perform the personal services imposed on landlords by case law, or in the alternative involuntarily dispose of his property to someone willing to undertake the required duties of a landlord. *Hawaii Housing Authority* does not purport to approve of such draconian conduct by a public agency.

I find the unanimous opinion of the Court of Appeal to be persuasive and therefore adopt the views of Presiding Justice Klein and Justices Lui and Danielson as my own. Their opinion follows in full, except that I omit their concluding discussion of the validity of other sections of the rent control law and attorney's fees:

The City of Santa Monica and the Santa Monica Rent Control Board (collectively Santa Monica) appeal the issuance of a writ of mandate ordering them to give Jerome J. Nash (Nash) a demolition permit. The writ was granted on the grounds that section 1803, subdivision (t) of the Santa Monica Rent Control Charter Amendment which rendered Nash ineligible for a demolition permit was unconstitutional.

Because the demolition permit requirement of section 1803, subdivision (t) in its application to the fact situation before us violates article I, section 7, subdivision (a) of the California Constitution; we affirm.

FACTS AND PROCEDURAL HISTORY

In 1978, Nash purchased a six-unit apartment building which is the subject of this controversy. After operating the apartment for a time, Nash decided that he did not like being a landlord.

In 1979, the citizens of Santa Monica by initiative added article XVIII to the city's charter. This new article provided for a rent control board with the authority to set and adjust maximum rents and to control the removal of rental units from the housing market. (§ 1803.)[1] The rent control law also regulates tenant evictions. (§ 1806.)

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[1] Unless otherwise indicated all section references are to Santa Monica City Charter, article XVIII.

Section 1803 subdivision (t)[2] of the rent control law requires a landlord to obtain a permit before demolishing a building. Where the landlord both owns habitable property and does not wish to rebuild, a demolition permit will be granted only upon a finding that (1) the building is not occupied by persons of low or moderate income, (2) cannot be afforded by persons of low or moderate income, (3) removal will not adversely affect the housing supply and (4) owner cannot make a reasonable return on investment.

On or about December 3, 1979, Nash petitioned the Rent Control Board for a demolition permit. Although

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[2] Section 1803, subdivision (t) provides as follows: "(t) REMOVAL OF CONTROLLED RENTAL UNIT FROM RENTAL HOUSING MARKET: Any landlord who desires to remove a controlled rental unit from the rental housing market by demolition, conversion or other means is required to obtain a permit from the Board prior to such removal from the rental housing market in accordance with the rules and regulations promulgated by the Board. In order to approve such a permit, the Board is required to make each of the following findings; [¶] (1) That the controlled rental unit is not occupied by a person or family of very low income, low income or moderate income. [¶] (2) That the rent of the controlled rental unit is not at a level affordable by a person or family of very low income, low income, or moderate income. [¶] (3) That the removal of the controlled rental unit will not adversely affect the supply of housing in the City of Santa Monica. [¶] (4) That the landlord cannot make a fair return on investment by retaining the controlled rental unit. [¶] Notwithstanding the foregoing provisions of this subsection, the Board may approve such a permit: [¶] (1) If the Board finds that the controlled rental unit is uninhabitable and is incapable of being made habitable in an economically feasible manner, or [¶] (2) if the permit is being sought so that the property may be developed with multifamily dwelling units and the permit applicant agrees as a condition of approval that the units will not be exempt from the provisions of this Article pursuant to Section 1801(c) and that at least fifteen (15) per cent of the controlled rental units to be built on the site will be at rents affordable by persons of low income."

required to do so by regulation, Nash did not concurrently file a petition for rent increase. He justified this omission on the grounds that he did not want to change the rents; he wanted to destroy the structure. The Rent Control Board returned his petition for a demolition permit as incomplete.

Rather than complete the petition, Nash filed a petition for a writ of mandate with the trial court. After a hearing, the trial court determined that Nash had no adequate administrative avenue for obtaining the demolition permit as he could not comply with section 1803, subdivision (t). The trial court found that Nash was capable of making a fair return on his investment and that the building was affordable to and currently rented by persons of moderate or lower incomes.

Based on those findings, the trial court concluded as a matter of law that the Rent Control Board's refusal to issue the demolition permit amounted to a deprivation of property without due process of law, and a taking for public use without just compensation. A peremptory writ of mandate was issued commanding the Rent Control Board to issue Nash a removal permit. An appeal was timely filed on September 1, 1980.

CONTENTIONS

On appeal, Santa Monica claims that the demolition restrictions are squarely within the ambit of the police power. Nash contends that the restrictions exceed the bounds of the police power by impermissibly impinging on his right to go out of the landlord business.

The issue[3] before this court is therefore whether section 1803, subdivision (t), insofar as it restricts the right of a landowner to go out of business by tearing down his building, violates the due process clause of the California Constitution. (Cal.Const., art. I, § 7, subd. (a).)

DISCUSSION

1. *Standard of review is strict scrutiny.*

Generally, an exercise of the police power will withstand a substantive due process challenge so long as it is "reasonably related to a proper legislative goal." (Perez v. City of San Bruno (1980) 27 Cal.3d 388, 398.) In reviewing police regulations, the court's role is usually very limited. "The wisdom of the legislation is not at issue [and] the availability of less drastic remedial alternative [will not] invalidate a statute." (*Ibid.;* see also Weaver v. Jordan (1966) 64 Cal.2d 235, 258-259 (J. Mosk dis.).)

However, where the rights affected by legislation are "so fundamental or 'implicit in the concept of ordered liberty' (Palko v. Connecticut (1937) 302 U.S. 319, 325 . . .) as to require equivalent protection," a more searching level of scrutiny is applied. (Perez v. City of San Bruno, supra, 27 Cal.3d at pp. 889-890.) Our task therefore is to determine the nature of the rights involved here and the appropriate standard of review.

Under section 1803 subdivision (t) as long as the structure is habitable and low or moderate income people can afford the apartments, the owner cannot get a permit to withdraw the rental units from the market. A landlord

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[3] Nash did not seek to defend the trial court's conclusion that section 1803, subdivision (t) constituted a compensable taking. Because of our resolution of the due process issue, we need not consider whether the resolution of the taking issue was correct.

cannot terminate his business[4] by evicting all the tenants and letting the building stand empty, since evictions are carefully regulated. (See § 1806.) Additionally, because conversion permits are available only under the same conditions as demolition permits, an owner cannot cease being a landlord by selling the units as condominiums.[5] The only possible way out is to sell to someone who is willing to be a landlord. To do so, however, may cause substantial financial hardship if the value of the property has dropped as a result of rent control. A landowner who wishes to keep the land is therefore compelled to stay in the residential rental housing business. Thus, the rent control law impinges upon the individual's right to go out of business.

Having demonstrated that the right involved is the right to go out of business, we must now determine whether infringements of that right are subject to strict scrutiny. The resolution of this issue turns on the nature of the right.

The right to cease operating a business has not been widely discussed, hence its contours and boundaries are not clear. We do not purport here to define fully the extent of the right to go out of business, since its very core is infringed upon by the statute before us. Generally speaking, it is the right of the individual to stop working

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[4] Neither party disputes that renting housing is a business. (See Marina Point, Ltd. v. Wolfson (1982) 30 Cal.3d 721, 731.)

[5] In addition to the regular permitting requirement, Santa Monica has recently instituted a temporary moratorium on condominium conversion, thereby completely eliminating conversion as a method of going out of business. (See Housing Element, Santa Monica Master Plan, Program 25.)

in a given occupation or the operation of a given business.[6] Although the right does not restrict the state's power to regulate the conduct of a business voluntarily engaged in, it restricts the government's ability to force the individual to participate in a particular enterprise. Because it touches the individual's ability to make a choice which greatly affects his or her life style, the right to go out of business is a personal freedom. Its title, which makes it sound like an economic right is therefore deceptive.

The group of rights protected by strict judicial scrutiny is not limited to rights expressly set forth in the Constitution, but "extends to basic values 'implicit in the concept of ordered liberty.' [Citation.]" (City of Carmel-by-the-Sea v. Young (1970) 2 Cal.3d 259, 266; Serrano v. Priest (1976) 18 Cal.3d 728, 767.) Therefore, that the right to go out of business is neither an express nor a widely acknowledged right does not bar the application of strict scrutiny.

There exists an undefined yet real notion of freedom which is violated by the idea of compelling an individual to work in a given business. This freedom is protected from the most egregious infringements by the Thirteenth Amendment of the United States Constitution. Yet the degree to which the individual is restricted need not rise to the level of involuntary servitude before it offends this notion of personal liberty. For example, employment contracts for personal services are not specifically enforceable against either the employee or the employer. (Civ. Code, § 3390, see also § 3423, subd. Fifth.)

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[6]We note that the right to go out of business does not apply to public utilities, which hold a special place both in relation to the public welfare and in the law. (See Cal. Const., art. XII, § 3.)

Indeed, California courts have even been reluctant to force landowners to use property in a specified manner. In Dept. of Public Works v. San Diego (1932) 122 Cal.App. 159, 166-167, the court stated: "While the police power may limit and restrict the uses to which an owner may put his property, it may not compel him to use such property for a particular purpose if he prefers to abandon such a use thereof." The right to cease to operate a business, impacting as it does on the work efforts of the proprietor, is one aspect of this more general freedom.

The right of an individual not to work in a certain occupation is closely analogous to the "right to work for a living in the common occupations of the community." (Sail'er Inn, Inc. v. Kirby (1971) 5 Cal.3d 1, 17; Purdy & Fitzpatrick v. State of California (1969) 71 Cal.2d 566, 576.) Deemed "essential to the pursuit of life, liberty and happiness," the right to work in a common occupation is protected from unjustified interference by strict scrutiny review. (Sail'er Inn, Inc. v. Kirby, supra, 5 Cal.3d at p. 17; but cf. D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 18 [right to work in technical or complex field not protected by strict scrutiny].)

Like the right to enter an occupation, the right to terminate a business involves a personal decision concerning the individual's role in the economy. Both protect the individual's ability to use his or her talents and resources in the manner best suited to bring life satisfaction and economic security.

Given the close relationship between the right to go out of business and other rights which are fundamental, the rational basis standard of review seems improper. Accordingly, we shall use heightened scrutiny in evaluating laws which infringe upon the right to go out of business.

In their supplemental brief Santa Monica contends that even if the right to go out of business is fundamental, section 1803, subdivision (t) should not be analyzed under strict scrutiny. They argue section 1803, subdivision (t) is just a land use regulation subject to rational basis scrutiny and that any infringement on the right is merely incidental. In support of this argument, Santa Monica cites Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal.3d 582. That case however is clearly distinguishable. In *Associated Home Builders* the court refused to apply strict scrutiny to an exclusionary zoning ordinance despite appellants' claim that the right to travel was involved. In reaching this conclusion the court noted that the ordinance did not penalize the right to travel, but rather only made its exercise more difficult. (*Id.*, at p. 603.)

Here section 1803, subdivision (t) does not just make it hard for a property owner simultaneously to keep his land yet cease being a landlord, it makes it impossible. Therefore, although it appears on the surface that section 1803, subdivision (t) is a purely economic regulation, it fundamentally affects a personal right and strict scrutiny must be applied.

2. *Section 1803, subdivision (t) fails to meet the strict scrutiny test.*

"When rights of such fundamental nature are involved, 'regulations limiting these rights may be justified only by a "compelling state interest," [citations] and . . . legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.' " (Perez v. City of San Bruno, supra, 27 Cal.3d 875 at p. 890, fn. 11.) Assuming arguendo that Santa Monica's interest in preserving the stock of rental housing is compelling, we must decide whether the statute is drawn closely enough to pass constitutional muster.

A nonexhaustive survey of other rent control acts reveals that the Santa Monica act imposes the greatest limits on a landowner's ability to go out of the rental business. Most liberal was the federal rent control act enacted during World War II, and even this wartime measure provided that "[n]othing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent." (Emergency Price Control Act of 1942, as quoted in Bowles v. Willingham (1943) 321 U.S. 503 [88 L.Ed. 892, 905].)

Several jurisdictions expressly permit tenant evictions to facilitate demolitions. (1970 Mass. Acts 1970, ch. 842, § 9(a) 9; 1969 Mass. Acts 1969, ch. 797 [rent and eviction controls for Boston, Mass.]; Berkeley, Cal. City Ordinance, Stats. 1972 (Reg. Sess.) res. ch. 96, p. 3372, declared unconstitutional on other grounds, Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129.)

Only the New York Emergency Housing Rent Control Act (N.Y. Unconsol. Laws, § 8581 et seq.) comes close to the Santa Monica law. It required rental commission approval before a unit can be withdrawn from the market where such withdrawal involves the eviction of a tenant. (N.Y. Unconsol. Laws, § 8590(4).) However, under the New York law, a landlord could demolish a building if it is to be replaced with a nonresidential structure, which is not true in Santa Monica. (N.Y. Unconsol. Laws, § 8585, subd. 2(d)(ii); cf. Housing Element, Santa Monica Master Plan, Program 10.)

These other laws demonstrate that it is possible to pursue the goals of avoiding the depletion of the housing stock and preventing upward pressure on rents without forcing a landowner to be in the residential housing business against his/her will.

The Santa Monica law may be marginally more effective from those of other jurisdictions. Realistically, however, few landowners will prefer to see their land lying fallow instead of producing income; thus, the practical effect of such strong removal restrictions on the housing stock is probably minimal.

Additionally, we note that the vacancy rate in surrounding communities is higher than in Santa Monica.[7] Therefore, a fractional decrease in Santa Monica's housing stock should not have a strong adverse effect on the public as alternative accommodations are available. While Santa Monica has the right to preserve housing regardless of what occurs in neighboring jurisdictions, greater housing opportunities in the surrounding areas make the Santa Monica controls less "compelling." On the other hand, the incursion on the right to go out of business is strong. (See Discussion, *ante,* at p. ____.*

The state has the burden of demonstrating the necessity of regulations that infringe on fundamental interests. (Subriar v. City of Bakersfield (1976) 59 Cal.App.3d 175, 199-200.) Here there has been an insufficient showing of such a necessity that the benefits received outweigh the strong burden on a personal freedom.

Santa Monica may be concerned that less stringent regulation of removals would permit the circumvention of the rent control law by allowing landlords to demolish

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[7] The vacancy rate in early 1981 in West Los Angeles was 2.12 percent. (City of Los Angeles Housing Statistics, Dept. of City Planning.) The vacancy rate in Santa Monica using 1980 census data was 1.7 percent. (Technical Rep. to Housing Element, p. 165.)

We take judicial notice of statistics from the Department of City Planning pursuant to Evidence Code section 452, subdivision (h).

*Typed opinion *ante,* page 8.

their buildings and then replace them with newly constructed units which are not subject to rent control. While this concern is legitimate, (see discussion in Flynn v. City of Cambridge (Mass. 1981) ____ Mass. ____, 418 N.E.2d 335, 339), less intrusive means may be found for achieving it. Santa Monica could make new construction on lots formerly containing rent controlled property subject to rent control.

Because the demolition permit requirement section 1803, subdivision (t) infringes more than is necessary in this limited fact situation for the effectuation of its goals, it violates the due process clause of article I, section 7, subdivision (a). We do not hold that all demolition controls are constitutionally infirm. We find only that the current Santa Monica ordinance is too restrictive to pass constitutional muster. [End of Court of Appeal opinion.][8]

I would affirm the judgment.

MOSK, J.

I CONCUR:

*CROSBY, J.p.t.

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[8]The commendable solicitude of the City of Santa Monica for tenants apparently does not apply when the city itself is a landlord. (See, e.g., Harmon v. Superior Court, City of Santa Monica Real Party in Interest, 2 Civ. B003391.)

*Assigned by the Chairman of the Judicial Council.

APPENDIX B

APPENDIX B

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

Jerome J. Nash, Petitioner and Respondent, v. City of Santa Monica, a Municipal Corporation; Santa Monica Rent Control Board, an agency of the City of Santa Monica, Appellants. 2d Civil Nos. 60079 and 61923 (Super. Ct. No. C 311 502) (Consolidated on Appeal).

Filed May 25 1983.

APPEAL from a judgment of the Superior Court of Los Angeles County. Jerry Pacht, Judge. Affirmed.

Robert M. Myers, City Attorney, Stephen S. Stark, Assistant City Attorney, Susan L. Carroll and Karl M. Manheim, Deputy City Attorneys, for Appellant City of Santa Monica.

Michael Heumann, Senior Attorney, David Pettit and Stephen P. Wiman, Staff Attorneys, for Appellant Santa Monica Rent Control Board.

Rich & Ezer and Mitchel J. Ezer for Petitioner and Respondent.

Bonelli, Heib, Fuchs & O'Neal and Stanley Sapiro as Amicus Curiae on behalf of Petitioner and Respondent.

Latham & Watkins and Stephen L. Jones and George Kimball as Amicus Curiae on behalf of Petitioner and Respondent.

The City of Santa Monica and the Santa Monica Rent Control Board (collectively Santa Monica) appeal the issuance of a writ of mandate ordering them to give Jerome J. Nash (Nash) a demolition permit. The writ was

granted on the grounds that section 1803 subdivision (t) of the Santa Monica Rent Control Charter Amendment which rendered Nash ineligible for a demolition permit was unconstitutional.

Because the demolition permit requirement of section 1803 subdivision (t) in its application to the fact situation before us violates article I section 7(a) of the California Constitution, we affirm.

FACTS AND PROCEDURAL HISTORY

In 1978, Nash purchased a six unit apartment building which is the subject of this controversy. After operating the apartment for a time, Nash decided that he did not like being a landlord.

In 1979, the citizens of Santa Monica by initiative added Article XVIII to the city's charter. This new article provided for a rent control board with the authority to set and adjust maximum rents and to control the removal of rental units from the housing market. (§ 1803.)[1] The Rent Control Law also regulates tenant evictions. (§ 1806.) Section 1803 subdivision (t)[2] of the Rent

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[2]Section 1803 subdivision (t) provides as follows: "(t) REMOVAL OF CONTROLLED RENTAL UNIT FROM RENTAL HOUSING MARKET: Any landlord who desires to remove a controlled rental unit from the rental housing market by demolition, conversion or other means is required to obtain a permit from the Board prior to such removal from the rental housing market in accordance with rules and regulations promulgated by the Board. In order to approve such a permit, the Board is required to make each of the following findings; [¶] (1) That the controlled rental unit is not occupied by a person or family of very low income, low income or moderate income. [¶] (2) That the rent of the controlled rental unit is not at a level affordable by a person or family of very low income,

Control Law requires a landlord to obtain a permit before demolishing a building. Where the landlord both owns habitable property and does not wish to rebuild, a demolition permit will be granted only upon a finding that (1) the building is not occupied by persons of low or moderate income, (2) cannot be afforded by person of low or moderate income, (3) removal will not adversely affect the housing supply and (4) owner cannot make a reasonable return on investment.

On or about December 3, 1979, Nash petitioned the Rent Control Board for a demolition permit. Although required to do so by regulation, Nash did not concurrently file a petition for rent increase. He justified this omission on the grounds that he did not want to change the rents; he wanted to destroy the structure. The Rent Control Board returned his petition for a demolition permit as incomplete.

Rather than complete the petition, Nash filed a petition for a writ of mandate with the trial court. After a hearing, the trial court determined that Nash had no adequate administrative avenue for obtaining the demolition permit as he could not comply with section 1803 subdivision (t).

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is not at a level affordable by a person or family of very low income, low income, or moderate income. [¶] (3) That the removal of the controlled rental unit will not adversely affect the supply of housing in the City of Santa Monica. [¶] (4) That the landlord cannot make a fair return on investment by retaining the controlled rental unit. [¶] Notwithstanding the foregoing provisions of this subsection, the Board may approve such a permit: [¶] (1) If the Board finds that the controlled rental unit is uninhabitable and is incapable of being made habitable in an economically feasible manner, or [¶] (2) If the permit is being sought so that the property may be developed with multifamily dwelling units and the permit applicant agrees as a condition of approval that the units will not be exempt from the provisions of this Article pursuant to Section 1801(c) and that at least fifteen (15) per cent of the controlled rental units to be built on the site will be at rents affordable by persons of low income.

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Because the demolition permit requirement of section 1803 subdivision (t) in its application to the fact situation before us violates article I section 7(a) of the California Constitution, we affirm.

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The trial court found that Nash was capable of making a fair return on his investment and that the building was affordable to and currently rented by persons of moderate or lower incomes.

Based on those findings, the trial court concluded as a matter of law that the Rent Control Board's refusal to issue the demolition permit amounted to a deprivation of property without due process of law, and a taking for public use without just compensation. A peremptory writ of mandate was issued commanding the Rent Control Board to issue Nash a removal permit. An appeal was timely filed on September 1, 1980.

CONTENTIONS

On appeal, Santa Monica claims that the demolition restrictions are squarely within the ambit of the police power. Nash contends that the restrictions exceed the bounds of the police power by impermissibly impinging on his right to go out of the landlord business.

The issue[3] before this court is therefore whether section 1803 subdivision (t), insofar as it restricts the right of a landowner to go out of business by tearing down his building, violates the due process clause of the California Constitution. (Cal. Const., art. 1, § 7(a).)

DISCUSSION

1. *Standard of review is strict scrutiny.*

Generally, an exercise of the police power will withstand a substantive due process challenge so long as it is

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[3]Nash did not seek to defend the trial court's conclusion that section 1803 subdivision (t) constituted a compensable taking. Because of our resolution of the due process issues, we need not consider whether the resolution of the taking issue was correct.

"reasonably related to a proper legislative goal." (*Perez v. City of San Bruno* (1980) 27 Cal.3d 875, 889; *Hale v. Morgan* (1978) 22 Cal.3d 388, 398.) In reviewing police power regulations, the court's role is usually very limited. "The wisdom of the legislation is not at issue [and] the availability of less drastic remedial alternatives [will not] invalidate a statute." (*Ibid.*; see also *Weaver v. Jordan* (1966) 64 Cal.2d 235, 248-259 (J. Mosk dissenting).)

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In their supplemental brief Santa Monica contends that even if the right to go out of business is fundamental, section 1803, subdivision (t) should not be analyzed under strict scrutiny. They argue section 1803, subdivision (t) is just a land use regulation subject to rational basis scrutiny and that any infringement on the right is merely incidental. In support of this argument, Santa Monica cites *Associated Home Builders Etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582. That case however is clearly distinguishable. In *Associated Home Builders* the court refused to apply strict scrutiny to an exclusionary zoning ordinance despite appellants' claim that the right to travel was involved. In reaching this conclusion the court noted that the ordinance did not penalize the right to travel, but rather only made its exercise more difficult. (*Id.*, at p. 603.)

Here section 1803, subdivision (t) does not just make it hard for a property owner simultaneously to keep his

land yet cease being a landowner, it makes it impossible. Therefore, although it appears on the surface that section 1803, subdivision (t) is a purely economic regulation, it fundamentally effects a personal right and strict scrutiny must be applied.

2. *Section 1803 subdivision (t) fails to meet the strict scrutiny test.*

"When rights of such fundamental nature are involved, 'regulation limiting these rights may be justified only by a "compelling state interest," [citations] and . . . legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.' " (*Perez v. City of San Bruno, supra*, 27 Cal.3d 875 at p. 890, fn. 11.) Assuming arguendo that Santa Monica's interest in preserving the stock of rental housing is compelling, we must decide whether the statute is drawn closely enough to pass constitutional muster.

A nonexhaustive survey of other rent control acts reveals that the Santa Monica act imposes the greatest limits on a landowner's ability to go out of the rental business. Most liberal was the federal rent control act enacted during World War II, and even this wartime measure provided that "[n]othing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent." (Emergency Price Control Act of 1942, as quoted in *Bowles v. Willingham* (1943) 321 U.S. 503 [88 L.Ed. 892, 905.].)

Several jurisdictions deny their respective rent control boards authority to prevent a demolition, even where tenant eviction is necessary. (See 1970 Mass. Acts 1970, ch. 842, § 9(a) 9; Cambridge, Mass. city ordinance, Ordinance No. 926; Berkeley, Cal. city ordinance, Stats.

1972 (Reg. Sess.) res. ch. 96, p. 3372, declared unconstitutional on other grounds, *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129.)

Only the New York Emergency Housing Rent Control Act ((N.Y.) Unconsol. Law § 8581 et seq.) comes close to the Santa Monica law. It requires rental commission approval before a unit can be withdrawn from the market where such withdrawal involves the eviction of a tenant. ((N.Y.) Unconsol. Laws § 8590(4).) However, under the New York scheme, a landlord may go out of business by leaving the apartments empty after tenants voluntarily leave. This is does not appear to be true in Santa Monica, since section 1803 subdivision (t) requires a permit before a rental unit can be removed from the market by "demolition, conversion or *other means.*" (Emphasis added.) Also, under the New York law, a landlord could demolish a building if it is to be replaced with a nonresidential structure, which is not true in Santa Monica. ((N.Y.) Unconsol. Laws § 8585, subd. 2(d)(ii); cf, Housing Element, Santa Monica Master Plan, Program 10.)

These other laws demonstrate that it is possible to pursue the goals of avoiding the depletion of the housing stock and preventing upward pressure on rents without forcing a landowner to be in the residential housing business against his/her will.

The Santa Monica law may be marginally more effective from those of other jurisdictions. Realistically, however, few landowners will prefer to see their land lying fallow instead of producing income; thus, the practical effect of such strong removal restrictions on the housing stock is probably minimal.

Additionally, we note that the vacancy rate in surrounding communities is higher than in Santa Monica.[7] Therefore, a fractional decrease in Santa Monica's housing stock will not have a strong adverse effect on the public as alternative accommodations are available. While Santa Monica has the right to preserve housing regardless of what occurs in neighboring jurisdictions, greater housing opportunities in the surrounding areas make the Santa Monica controls less "compelling." On the other hand, the incursion on the right to go out of business is strong. (See Discussion, *supra,* at p. 6.)

The state has the burden of demonstrating the necessity of regulations that infringe on fundamental interests. (*Subriar v. City of Bakersfield* (1976) 59 Cal.App.3d 175, 199-200.) Here there has been an insufficient showing of such a necessary that the benefits received outweigh the strong burden on a personal freedom.

Santa Monica may be concerned that less stringent regulation of removals would permit the circumvention of the Rent Control Law by allowing landlords to demolish their building and then replace them with newly constructed units which are not subject to rent control. While this concern is legitimate, (see discussion in *Flynn v. City of Cambridge* (Mass. 1981) ___ Mass. ___ 418 N.E.2d 335, 339), less intrusive means may be found for achieving it. Santa Monica could make new construction on lots formerly containing rent controlled property subject to rent control.

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[7]The vacancy rate in early 1981 in West Los Angeles was 2.12 percent. (City of Los Angeles Housing Statistics, Dept. of City Planning.) The vacancy rate in Santa Monica using 1980 census data was 1.7 percent. (Technical Report to Housing Element p. 165.)

We take judicial notice of statistics from the Department of City Planning pursuant to Evidence Code section 452, subdivision (h).

Because the demolition permit requirement section 1803 subdivision (t) infringes more than is necessary in this limited fact situation for the effectuation of its goals, it violates the due process clause of article I section 7(a).

3. *The invalidity of other sections of the Rent Control Law raised by amicus curiae.*

In its brief, amicus curiae challenges the validity of sections of the Rent Control Law other than section 1803 subdivision (t). It urges that the unconstitutionality of other sections taints section 1803 subdivision (t) and mandates our affirmance of the trial judge. Such objections were not raised before either this court or the trial court. "Amicus curiae must accept the issues made and propositions urged by the appealing parties and any additional questions presented in a brief filed by amicus curiae will not be considered." (*Pratt v. Coast Trucking, Inc.* (1964) 228 Cal.App2d 139, 143; see also *E. L. White Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 510-511.) We therefore decline to address those arguments.

4. *Attorneys' fees.*

One amicus curiae asks for an award of attorneys' fees both for itself and for Nash. Nash asked for attorneys' fees in his complaint, but the trial court did not grant them. Nash has not appealed that determination. We therefore deem his right to fees waived. (See *Salter v. Ulrich* (1943) 22 Cal.2d 263, 268 (no review of issues effecting nonappealing party); see also *Henderson v. Security National Bank* (1977) 72 Cal.App.3d 764, 769 (point not discussed in brief deemed waived).)

Amici curiae are not entitled to fees under Code of Civil Procedure section 1021.5 as they are not parties. We also decline to award them fees under a substantial benefit theory.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

KLEIN, P. J.

We concur:

LUI, J.

DANIELSON, J.

APPENDIX C

APPENDIX C

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Superior Court of the State of California for the County of Los Angeles.

Jerome J. Nash, Petitioner, vs. City of Santa Monica, etc., et al., Defendants. No. C-311502.

Filed: June 20, 1980.

This cause came on regularly to be heard on May 8, 1980 in Department 85 of the above-entitled Court, the Honorable Jerry Pacht, Judge presiding, pursuant to the verified Petition for Writ of Mandate of Petitioner Jerome J. Nash. An Alternative Writ of Mandate issued herein on February 7, 1980 and was duly served on Respondents.

Mitchel J. Ezer of Rich & Ezer appeared as attorney for Petitioner; Stephen S. Stark, Acting City Attorney of the City of Santa Monica, appeared as attorney for Respondent City of Santa Monica (the "City"); and Evelyn Keller and Richard Weinstock appeared as attorneys for Respondent Santa Monica Rent Control Board (the "Board").

The cause was heard on the verified Petition for Writ of Mandate, Respondents' Return to Writ by Way of Answer, the Declaration of Petitioner in Support of Petition for Writ of Mandate, the Memorandum of Points and Authorities in Support of Petition for Writ of Mandate, the Respondents' Memorandum of Points and Authorities in Opposition to Petition for Writ of Mandate, the Exhibits to Respondents' Memorandum of Points and Authorities in Opposition to Petition for Writ of Mandate, and the Supplemental Memorandum of Points and Authorities in Support of Petition for Writ of Mandate.

The cause having been argued and submitted for decision, and the Court being fully advised in the premises, hereby makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. At all times herein mentioned, the City was and now is a municipal corporation duly organized and existing as such under and by virtue of the laws of the State of California.

2. At all times herein mentioned, the Board was and now is an agency of the City.

3. At all times since February 1, 1978, Petitioner has been and is now the owner of that certain six-unit apartment building (the "Building") located at 1220-30 Washington Avenue, Santa Monica, California.

4. At all times since February 1, 1978, Petitioner has been and now is engaged in the business (the "Business") of renting apartment units in the building to tenants.

5. By Charter Amendment enacted April 10, 1979, the Santa Monica Rent Control Law (the "Rent Control Law") was put into effect and ever since has been and is now in full force and effect.

6. Section 1803(t) of the Rent Control Law provides that:

> "Any landlord who desires to remove a rental unit from the rental housing market by demolition, conversion, or other means is required to obtain a permit from the Board prior to such removal from the rental housing market in accordance with rules and regulations promulgated by the Board. In order to approve

such a permit, the Board is required to make each of the following findings.

(1) That the controlled rental unit is not occupied by a person or family of very low income, low income or moderate income.

(2) That the rent of the controlled rental units is not at a level affordable by a person or family of very low income, low income, or moderate income.

(3) That the removal of the controlled rental unit will not adversely affect the supply of housing in the City of Santa Monica.

(4) That the landlord cannot make a fair return on the investment by retaining the controlled rental unit.

Notwithstanding the foregoing provisions of this subsection, the Board may approve such a permit:

(1) If the Board finds that the controlled rental unit is uninhabitable and is incapable of being habitable in an economically feasible manner, or

(2) If the permit is being sought so that the property may be developed with multifamily dwelling units and the permit applicant agrees as a condition of approval that the units will not be exempt from the provisions of this Article pursuant to Section 1801(c) and that at least fifteen (15) percent of the controlled rental units to be built on the site will be at rents affordable by persons of low income."

7. The Board is empowered under Section 1803(g) of the Rent Control Law to "Issue and follow such rules and regulations . . . as will further the purposes of this Article." Pursuant thereto the Board adopted Chapter 5 regulations, effective August 3, 1979, which provide at

Section 5014 the standards and procedures for the type of removal, known as Category 1, sought by Petitioner. Section 5014 provides:

> "5014. *Standards for Category 1 Permits.*
>
> (a) A Category 1 removal permit will only be granted if the rent based upon family size exceeds 30% of moderate income as determined by the Board on an annual basis.
>
> (b) A Category 1 removal permit will only be granted if the income of all tenants exceeds moderate income as determined by the Board on an annual basis.
>
> (c) In determining whether or not the granting of a Category 1 removal permit will adversely affect the supply of housing in the City of Santa Monica, the board shall consider all relevant factors, including the city-wide vacancy rate, the number of rental units being removed, the cumulative impact of removal, and whether or not the proposed development offers housing opportunities for existing tenants of the rental units to be removed.
>
> (d) Since one of the required findings for a Category 1 removal permit is that the landlord cannot make a fair return on investment by retaining the controlled rental unit, the landlord will be required to file concurrently with its application under this Chapter an application for an individual rent adjustment under Section 1805 of the Santa Monica City Charter and Chapter 4 of these regulations. The Board will consider the application for an individual rent adjustment. As an alternative to granting a removal permit, the Board may adjust the rent level so that the landlord may make a fair return on investment by retaining the controlled rental unit."

8. On December 5, 1979, Petitioner submitted an "Application for Removal Permit" (the "Application") to the Board, seeking a permit to terminate his Business and demolish the Building.

9. In the letter which accompanied the Application, Petitioner, through his counsel, stated in pertinent part:

> "Mr. Nash respectfully declines to file a concurrent Petition for Rent Increase. He does not want to increase rents, but to demolish the Building."

10. On December 20, 1979, the Board rejected the Application on grounds that Petitioner must instead file a Petition for Rent Increase to enable the Board to determine if Petitioner would be able to make a "fair return" by continuing to operate the Business.

11. Petitioner is not required further to exhaust his administrative remedies, as there is no adequate administrative remedy available to Petitioner which would entitle him to terminate his Business and demolish the Building. Petitioner cannot comply with Section 1803(t) of the Rent Control Law and Section 5014 of the Regulations because (i) Petitioner has conceded that he is making a fair return on his investment and can in the future make a fair return on his investment by retaining the Building and continuing to operate the Business therein; (ii) the demolition and removal of the Building will adversely affect the supply of housing in the City of Santa Monica; (iii) the rental being charged for the six units in the Building — ranging from $358.45 to $454.75 per month — is at a level which does not exceed 30% of moderate income by Board Standards; (iv) the monthly income of the persons or families occupying the six units in the Building — which range from $1200 per month to $1800 per month — do not each and all exceed moderate income by Board standards; (v) the six units in the Building are

all habitable; and (vi) Petitioner is not seeking the Removal Permit in order to redevelop the underlying land with multifamily dwelling units.

12. Petitioner has no plain, speedy and adequate remedy in the ordinary course of law, as there is no other proceeding by which Petitioner can obtain an order compelling the Board to issue a Removal Permit authorizing Petitioner to terminate his Business and demolish the building.

13. To the extent that any of the following Conclusions of Law are, or are deemed to be, Findings of Fact, the same are incorporated hereat by reference as though here set forth in full.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. To the extent that any of the foregoing Findings of Fact are, or are deemed to be, Conclusions of Law, the same are incorporated herein at this point by reference as though here set forth in full.

2. The refusal of the Board to issue a Removal Permit authorizing Petitioner to terminate his Business and demolish the Building violates the interdiction against the deprivation of property without due process of law contained in the Fourteenth Amendment to the Constitution of the United States and Article 1, Section 7(a) of the California Constitution.

3. The refusal of the Board to issue a Removal Permit authorizing Petitioner to terminate his Business and demolish the Building violates the interdiction against the taking of private property for

public use without just compensation contained in both the Fifth Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment to the Constitution of the United States, and Article 1, Section 19 of the California Constitution.

4. Petitioner is constitutionally entitled not to be compelled to sell the Building as the only means of terminating his Business and removing himself and his property from under the Board's regulatory jurisdiction.

5. Petitioner is entitled to the immediate issuance of a Peremptory Writ of Mandate commanding Respondents to issue a Removal Permit authorizing Petitioner to terminate his Business and demolish the Building.

6. Petitioner is entitled to recover his costs against Respondents.

Let Judgment Be Entered Accordingly.

Dated: June 20, 1980

/s/ JERRY PACHT
Judge of the Superior Court

JUDGMENT FOR PETITIONER

Superior Court of the State of California for the County of Los Angeles.

Jerome J. Nash, Petitioner, vs. City of Santa Monica, etc., et al., Defendants. No. C-311502.

Filed: July 3, 1980.

This cause came on regularly to be heard on May 8, 1980 in Department 85 of the above-entitled Court, the Honorable Jerry Pacht, Judge presiding, pursuant to the verified Petition for Writ of Mandate of Petitioner Jerome J. Nash. An Alternative Writ of Mandate issued herein on February 7, 1980 and was duly served on Respondents.

Mitchel J. Ezer of Rich & Ezer appeared as attorney for Petitioner; Stephen S. Stark, Acting City Attorney of the City of Santa Monica, appeared as attorney for Respondent City of Santa Monica, and Evelyn Keller and Richard Weinstock appeared as attorneys for Respondent Santa Monica Rent Control Board.

The cause was heard on the Petition for Writ of Mandate, Respondents' Return to Writ by Way of Answer, the Declaration of Petitioner in Support of Petition for Writ of Mandate, the Memorandum of Points and Authorities in Support of Petition for Writ of Mandate, the Respondents' Memorandum of Points and Authorities in Opposition to Petition for Writ of Mandate, the Exhibits to Respondents' Memorandum of Points and Authorities in Opposition to Petition for Writ of Mandate, and the Supplemental Memorandum of Points and Authorities in Support of Petition for Writ of Mandate.

The cause having been argued and submitted for decision, the Court being fully advised, and findings of fact and conclusions of law having been made, and the Court

having directed that judgment and a peremptory writ of mandate should issue in the cause,

IT IS ORDERED, ADJUDGED AND DECREED:

1. That a Peremptory Writ of Mandate issue forthwith commanding Respondents to issue to Petitioner a Removal Permit authorizing Petitioner to terminate his apartment-rental business and demolish his building at 1220-30 Washington Avenue, Santa Monica, California;

2. That Petitioner have and recover costs and disbursements herein in the sum of $51.00 from Respondents City of Santa Monica and the Santa Monica Rent Control Board.

Dated: 20 June, 1980

/s/ JERRY PACHT
Judge of the Superior Court

APPENDIX D

APPENDIX D

NOTICE OF APPEAL

In the Supreme Court of the State of California.

Jerome J. Nash, Plaintiff and Respondent, vs. City of Santa Monica, et al., Defendants and Appellants. L.A. 31798 (Super. Ct. No. C-311502).

The appellant, Jerome J. Nash, hereby appeals to the United States Supreme Court, pursuant to 28 U.S.C. sections 2101 and 2104, from the judgment and order entered by the Supreme Court of the State of California on October 25, 1984 and the final judgment entered after remittitur to the Los Angeles Superior Court on November 26, 1984.

Dated: December 21, 1984

RICH & EZER

By: MITCHEL J. EZER
1888 Century Park East, #1204
Los Angeles, California 90067

Attorneys for Appellant

Filed: December 24, 1984

APPENDIX E

APPENDIX E

RENT CONTROL CHARTER AMENDMENT

ARTICLE XVIII. RENT CONTROL

Section 1800. Statement of Purpose. A growing shortage of housing units resulting in a low vacancy rate and rapidly rising rents exploiting this shortage constitute a serious housing problem affecting the lives of a substantial portion of those Santa Monica residents who reside in residential housing. In addition, speculation in the purchase and sale of existing residential housing units results in further rent increases. These conditions endanger the public health and welfare of Santa Monica tenants, especially the poor, minorities, students, young families, and senior citizens. The purpose of this Article, therefore, is to alleviate the hardship caused by this serious housing shortage by establishing a Rent Control Board empowered to regulate rentals in the City of Santa Monica so that rents will not be increased unreasonably and so that landlords will receive no more than a fair return on their investment.

In order to accomplish this purpose, this Article provides for an elected rent control board to ensure that rents are at a fair level by requiring landlords to justify any rents in excess of the rents in effect one year prior to the adoption of this Article. Tenants may seek rent reductions from the rent in effect one year prior to the adoption of this Article by establishing that those rents are excessive. In addition to giving tenants an opportunity to contest any rent increase, this Article attempts to provide reasonable protection to tenants by controlling removal of controlled rental units from the housing market and by requiring just cause for any eviction from a controlled rental unit.

Section 1801. Definitions. The following words or phrases as used in this Article shall have the following meanings:

(a) BOARD: The term "Board" refers to the elected rent control board established by this Article.

(b) COMMISSIONERS: The members of the Board and Interim Board are denominated Commissioners.

(c) CONTROLLED RENTAL UNITS: All residential rental units in the City of Santa Monica, including mobile homes and mobile home spaces and trailers and trailer spaces, except:

(1) Rental units in hotels, motels, inns, tourist homes and rooming and boarding houses which are rented primarily to transient guests for a period of less than fourteen (14) days.

(2) Rental units in any hospital, convent, monastery, extended medical care facility, asylum, non-profit home for the aged, or dormitory owned and operated by an institution of higher education.

(3) Rental units which a government unit, agency or authority owns, operates, manages or in which governmentally-subsidized tenants reside only if applicable Federal or State law or administrative regulation specifically exempt such units from municipal rent control.

(4) Rental units in owner occupied dwellings with no more than three (3) units.

(5) Rental units and dwellings constructed after the adoption of this Article; this exemption does not apply to units created as a result of conversion as opposed to new construction.

(d) HOUSING SERVICE: Housing services include but are not limited to repairs, maintenance, painting, providing light, hot and cold water, elevator service, window shades and screens, storage, kitchen, bath and laundry facilities and privileges, janitor services, refuse removal, furnishings, telephone, parking and any other benefit, privilege or facility connected with the use or occupancy of any rental unit. Services to a rental unit shall include a proportionate part of services provided to common facilities of the building in which the rental unit is contained.

(e) LANDLORD: An owner, lessor, sublessor or any other person entitled to receive rent for the use and occupancy of any rental unit, or an agent, representative or successor of any of the foregoing.

(f) RENT: All periodic payments and all nonmonetary consideration including but not limited to, the fair market value of goods or services rendered to or for the benefit of the landlord under an agreement concerning the use or occupancy of a rental unit and premises, including all payment and consideration demanded or paid for parking, pets, furniture, subletting and security deposits for damages and cleaning.

(g) RENTAL HOUSING AGREEMENT: An agreement, oral, written or implied, between a landlord and tenant for use or occupancy of a rental unit and for housing services.

(h) RENTAL UNITS: Any building, structure, or part thereof, or land appurtenant thereto, or any other rental property rented or offered for rent for living or dwelling house units, and other real properties used for living or dwelling purposes, together

with all housing services connected with use or occupancy of such property such as common areas and recreational facilities held out for use by the tenant.

(i) TENANT: A tenant, subtenant, lessee, sublessee or any other person entitled under the terms of a rental housing agreement to the use or occupancy of any rental unit.

(j) RECOGNIZED TENANT ORGANIZATION: Any group of tenants, residing in controlled rental units in the same building or in different buildings operated by the same management company, agent or landlord, who requests to be so designated.

(k) RENT CEILING: Rent ceiling refers to the limit on the maximum allowable rent which a landlord may charge on any controlled rental unit.

(l) BASE RENT CEILING: The maximum allowable rent established in Section 1804(b).

Section 1802. Interim Rent Control Board:

No later than thirty (30) days after the adoption of this Article, the City Council of the City of Santa Monica shall appoint a five-member Interim Rent Control Board. No person shall be appointed to the Interim Rent Control Board unless he or she is a duly qualified elector of the City of Santa Monica. The Interim Board shall exercise the following powers and duties until the Permanent Board is elected in accordance with the provisions of Section 1803(d) and assumes office;

(1) Require registration of all controlled rental units under Section 1803(q).

(2) Seek criminal penalties under Section 1810.

(3) Seek injunctive relief under Section 1811.

Section 1803. Permanent Rent Control Board:

(a) COMPOSITION: There shall be in the City of Santa Monica a Rent Control Board. The Board shall consist of five elected Commissioners. The Board shall elect annually as chairperson one of its members to serve in that capacity.

(b) ELIGIBILITY: Duly qualified electors of the City of Santa Monica are eligible to serve as Commissioners of the Board.

(c) FULL DISCLOSURE OF HOLDINGS: Candidates for the position of Commissioner shall submit a verified statement listing all of their interests and dealings in real property, including but not limited to its ownership, sale or management, during the previous three (3) years.

(d) ELECTION OF COMMISSIONERS: Commissioners shall be elected at general municipal elections in the same manner as set forth in Article XIV of the Santa Monica City Charter, except that the first Commissioners shall be elected at a special municipal election held within ninety (90) days of the adoption of this Article. The elected Commissioners shall take office on the first Tuesday following their election.

(e) TERM OF OFFICE: Commissioners shall be elected to serve terms of four years, beginning on the first Tuesday following their election, except that of the first five Commissioners elected in accordance with Section 1803(d), the two Commissioners receiving the most votes shall serve until April 15, 1985 and the remaining three Commissioners shall serve until April 18, 1983. Commissioners shall serve a maximum of two full terms.

(f) POWERS AND DUTIES: The Board shall have the following powers and duties:

(1) Set the rent ceilings for all controlled rental units.

(2) Require registration of all controlled rental units under Section 1803(q).

(3) Establish a base ceiling on rents under Section 1804(b).

(4) To make adjustments in the rent ceiling in accordance with Section 1805.

(5) Set rents at fair and equitable levels in order to achieve the intent of this Article.

(6) Hire and pay necessary staff, including hearing examiners and personnel to issue orders, rules and regulations, conduct hearings and charge fees as set forth below.

(7) Make such studies, surveys and investigations, conduct such hearings, and obtain such information as is necessary to carry out its powers and duties.

(8) Report annually to the City Council of the City of Santa Monica on the status of controlled rental housing.

(9) Remove rent controls under Section 1803(r).

(10) Issue permits for removal of controlled rental units from rental housing market under Section 1803(t).

(11) Administer oaths and affirmations and subpoena witnesses.

(12) Establish rules and regulations for deducting penalties and settling civil claims under Section 1809.

(13) Seek criminal penalties under Section 1810.

(14) Seek injunctive relief under Section 1811.

(g) RULES AND REGULATIONS: The Board shall issue and follow such rules and regulations, including those which are contained in this Article, as will further the purposes of the Article. The Board shall publicize its rules and regulations prior to promulgation in at least one newspaper of general circulation in the City of Santa Monica. The Board shall hold at least one (1) public hearing to consider the views of interested parties prior to the adoption of general adjustments of the ceilings for maximum allowable rents under Section 1805 and any decision to decontrol or re-impose control for any class of rental units under Section 1803(r). All rules and regulations, internal staff memoranda, and written correspondence explaining the decisions, orders, and policies of the Board shall be kept in the Board's office and shall be available to the public for inspection and copying. The Board shall publicize this Article so that all residents of Santa Monica will have the opportunity to become informed about their legal rights and duties under rent control in Santa Monica. The Board shall prepare a brochure which fully describes the legal rights and duties of landlords and tenants under rent control in Santa Monica. The brochure will be available to the public, and each tenant of a controlled rental unit shall receive a copy of the brochure from his or her landlord.

(h) MEETINGS: The Board shall hold at least forty-eight (48) regularly scheduled meetings per year. Special meetings shall be called at the request of at least three Commissioners of the Board. The Board shall hold its initial meeting no later than 15 days after taking office.

(i) QUORUM: Three Commissioners shall constitute a quorum for the Board.

(j) VOTING: The affirmative vote of three Commissioners of the Board is required for a decision, including all motions, regulations, and orders of the Board.

(k) COMPENSATION: Each Commissioner shall receive for every meeting attended seventy-five dollars ($75.00), but in no event shall any Commissioner receive in any twelve month period more than forty-seven hundred and fifty dollars ($4,750) for services rendered.

(l) DOCKETS: The Board shall maintain and keep in its office all hearing dockets.

(m) VACANCIES: If a vacancy shall occur on the Board, the Board shall within thirty (30) days appoint a qualified person to fill such a vacancy until the following municipal election when a qualified person shall be elected to serve for the remainder of the term.

(n) FINANCING: The Board shall finance its reasonable and necessary expenses by charging landlords annual registration fees in amounts deemed reasonable by the Board. The first annual registration fee shall be set by the Board within thirty days after assuming office. The Board is also empowered to request and receive funding when and if necessary, from any available source for its reasonable and necessary expenses. Notwithstanding the preceding provisions of this paragraph, the City Council of the City of Santa Monica shall appropriate sufficient funds for the reasonable and necessary expenses of the Interim Board and Board during the six month period following adoption of this Article.

(o) RECALL: Commissioners may be recalled in accordance with the provisions of Article XIV of the Santa Monica City Charter.

(p) STAFF: The Board shall employ and pay such staff, including hearing examiners and inspectors, as may

be necessary to perform its functions efficiently in order to fulfill the purposes of this Article.

(q) REGISTRATION: Within sixty (60) days after the adoption of the Article, the Board shall require the registration of all controlled rental units, which shall be re-registered at times deemed appropriate by the Board. The initial registration shall include the rent in effect at the time on the date of the adoption of this Article, base rent ceiling, the address of the rental unit, the name and address of the landlord, the housing services provided to the unit, a statement indicating all operating cost increases since the base rent ceiling date, and any other information deemed relevant by the Board. The Board shall require the landlord to report vacancies in the controlled rental units and shall make a list of vacant controlled rental units available to the public. If the Board, after the landlord has proper notice and after a hearing, determines that a landlord has wilfully and knowingly failed to register a controlled rental unit, the Board may authorize the tenant of such a nonregistered controlled rental unit to withhold all or a portion of the rent for the unit until such time as the rental unit is properly registered. After a rental unit is properly registered, the Board shall determine what portion, if any, of the withheld rent is owed to the landlord for the period in which the rental unit was not properly registered. Whether or not the Board allows such withholding, no landlord who has failed to register properly shall at any time increase rents for a controlled rental unit until such units are properly registered.

(r) DECONTROL: If the average annual vacancy rate in any category, classification, or area of controlled rental units exceeds five (5) percent, the Board is empowered, at its discretion and in order to achieve the objectives of this Article, to remove rent controls from such category,

classification or area. The Board may determine such categories, classifications, or areas for purposes of decontrol consistent with the objectives of this Article. In determining the vacancy rate for any category, classification or area of controlled rental units, the Board shall consider all available data and shall conduct its own survey. If units are decontrolled pursuant to this subsection, controls shall be reimposed if the Board finds that the average annual vacancy rate has thereafter fallen below five (5) percent for such category, classification or area.

(s) SECURITY DEPOSITS: Any payment or deposit of money the primary function of which is to secure the performance of a rental agreement or any part of such agreement, including an advance payment of rent, shall be placed in an interest bearing account at an institution whose accounts are insured by the Federal Savings and Loan Insurance Corporation until such time as it is returned to the tenant or entitled to be used by the landlord. The interest on said account shall be used by the landlord to offset operating expenses and shall be a factor in making individual rent adjustments under Section 1805. In lieu of complying with this requirement, the landlord may pay interest directly to the tenant in accordance with the requirements of any state law.

(t) REMOVAL OF CONTROLLED RENTAL UNIT FROM RENTAL HOUSING MARKET: Any landlord who desires to remove a controlled rental unit from the rental housing market by demolition, conversion or other means is required to obtain a permit from the Board prior to such removal from the rental housing market in accordance with rules and regulations promulgated by the Board. In order to approve such a permit, the Board is required to make each of the following findings;

(1) That the controlled rental unit is not occupied by a person or family of very low income, low income or moderate income.

(2) That the rent of the controlled rental unit is not at a level affordable by a person or family of very low income, low income, or moderate income.

(3) That the removal of the controlled rental unit will not adversely affect the supply of housing in the City of Santa Monica.

(4) That the landlord cannot make a fair return on investment by retaining the controlled rental unit.

Notwithstanding the foregoing provisions of this subsection, the Board may approve such a permit:

(1) If the Board finds that the controlled rental unit is uninhabitable and is incapable of being made habitable in an economically feasible manner, or

(2) If the permit is being sought so that the property may be developed with multifamily dwelling units and the permit applicant agrees as a condition of approval that the units will not be exempt from the provisions of this Article pursuant to Section 1801(c) and that at least fifteen (15) percent of the controlled rental units to be built on the site will be at rents affordable by persons of low income.

Section 1804. Maximum Allowable Rents.

(a) TEMPORARY FREEZE: Rents shall not be increased during the one hundred-twenty (120) day period following the date of adoption of this Article.

(b) ESTABLISHMENT OF BASE RENT CEILING: Beginning one-hundred-twenty (120) days after the adoption of this Article, no landlord shall charge rent for any controlled rental units in an amount greater than

the rent in effect on the date one year prior to the adoption of this Article. The rent in effect on that date is the base rent ceiling and is a reference point from which fair rents shall be adjusted upward or downward in accordance with Section 1805. If there was no rent in effect on the date one year prior to the adoption of this Article, the base rent ceiling shall be the rent that was charged on the first date that rent was charged following the date one year prior to the adoption of this Article.

(c) POSTING: As soon as the landlord is aware of the maximum allowable rent, the landlord shall post it for each unit in a prominent place in or about the affected controlled rent units. The Board may require that other information it deems relevant also be posted.

Section 1805. Individual and General Adjustment of Ceilings on Allowable Rents.

(a) The Board may, after holding those public hearings prescribed by Section 1803(g), set and adjust upward or downward the rent ceiling for all controlled rental units in general and/or for particular categories of controlled rental units deemed appropriate by the Board. Such an adjustment, however, need not take effect immediately, and the Board may decide that new rent ceilings shall not take effect until some reasonable date after the above-stated time periods.

(b) Each year the Board shall generally adjust rents as follows:

(1) Adjust rents upward by granting landlords a utility and tax increase adjustment for actual increases in the City of Santa Monica for taxes and utilities.

(2) Adjust rents upward by granting landlords a maintenance increase adjustment for actual increases in the City of Santa Monica for maintenance expenses.

(3) Adjust rents downward by requiring landlords to decrease rents for any actual decreases in the City of Santa Monica for taxes.

In adjusting rents under this subsection, the Board shall adopt a formula of general application. This formula will be based upon a survey of landlords of the increases or decreases in the expenses set forth in this subsection.

(c) PETITIONS: Upon receipt of a petition by a landlord and/or a tenant, the maximum rent of individual controlled rental units may be adjusted upward or downward in accordance with the procedures set forth elsewhere in this Section. The petition shall be on the form provided by the Board. Notwithstanding any other provision of this Section, the Board or hearing examiner may refuse to hold a hearing and/or grant a rent adjustment if an individual hearing has been held and decision made with regard to maximum rent within the previous six months.

(d) HEARING PROCEDURE: The Board shall enact rules and regulations governing hearings and appeals of individual adjustment of ceilings on allowable rents which shall include the following:

(1) Hearing Examiner: A hearing examiner appointed by the Board shall conduct a hearing to act upon the petition for individual adjustment of ceilings on allowable rents and shall have the power to administer oaths and affirmations.

(2) Notice: The Board shall notify the landlord if the petition was filed by the tenant, or the tenant, if

the petition was filed by the landlord, of the receipt of such a petition and a copy thereof.

(3) Time-of Hearing: The hearing officer shall notify all parties as to the time, date and place of the hearing.

(4) Records: The hearing examiner may require either party to a rent adjustment hearing to provide it with any books, records and papers deemed pertinent in addition to that information contained in registration statements. The hearing examiner shall conduct a current building inspection and/or request the City to conduct a current building inspection if the hearing examiner finds good cause to believe the Board's current information does not reflect the current condition of the controlled rental unit. The tenant may request the hearing examiner to order such an inspection prior to the date of the hearing. All documents required under this Section shall be made available to the parties involved prior to the hearing at the office of the Board. In cases where information filed in a petition for rent ceiling adjustment or in additional submissions filed at the request of the hearing examiner is inadequate or false, no action shall be taken on said petition until the deficiency is remedied.

(5) OPEN HEARINGS: All rent ceiling adjustment hearings shall be open to the public.

(6) RIGHT OF ASSISTANCE: All parties to a hearing may have assistance in presenting evidence and developing their position from attorneys, legal workers, recognized tenant organization representatives or any other persons designated by said parties.

(7) HEARING RECORD: The Board shall make available for inspection and copying by any person an

official record which shall constitute the exclusive record for decision of the issues at the hearing. The record of the hearing, or any part of one, shall be obtainable for the cost of copying. The record of the hearing shall include: all exhibits, papers and documents required to be filed or accepted into evidence during the proceedings; a list of participants present; a summary of all testimony accepted in the proceedings; a statement of all materials officially noticed; all recommended decisions; orders and/or rulings; all final decisions, orders and/or rulings, and the reasons for each final decision, order and/or ruling. Any party may have the proceeding tape recorded or otherwise transcribed at his or her own expense.

(8) QUANTUM OF PROOF AND NOTICE OF DECISION: No individual adjustment shall be granted unless supported by the preponderance of the evidence submitted at the hearing. All parties to a hearing shall be sent a notice of the decision and a copy of the findings of fact and law upon which said decision is based. At the same time, parties to the proceeding shall also be notified of their right to any appeal allowed by the Board and/or to judicial review of the decision pursuant to this Section and Section 1808 of this Article.

(9) CONSOLIDATION: All landlord petitions pertaining to tenants in the same building will be consolidated for hearing, and all petitions filed by tenants occupying the same building shall be consolidated for hearing unless there is a showing of good cause not to consolidate such petitions.

(10) APPEAL: Any person aggrieved by the decision of the hearing examiner may appeal to the Board. On appeal, the board shall affirm, reverse or modify the decision of the hearing examiner. The

Board may conduct a de novo hearing or may act on the basis of the record before the hearing examiner without holding a hearing.

(11) FINALITY OF DECISION: The decision of the hearing examiner shall be the final decision of the Board in the event of no appeal to the Board. The decision of the hearing examiner shall not be stayed pending appeal; however, in the event that the Board on appeal reverses or modifies the decision of the hearing examiner, the landlord, in the case of a upward adjustment in rent, or the tenant, in the case of a downward adjustment of rent, shall be ordered to make retroactive payments to restore the parties to the position they would have occupied had the hearing examiner's decision been the same as that of the Board's.

(12) TIME FOR DECISION: The rules and regulations adopted by the Board shall provide for final board action on any individual rent adjustment petition within one-hundred and twenty (120) days following the date of filing of the individual rent adjustment petition.

(13) BOARD ACTION IN LIEU OF REFERENCE TO HEARING EXAMINER: The Board, on its own motion or on the request of any landlord or tenant, may hold a hearing on an individual petition for rent adjustment without the petition first being heard by a hearing examiner.

(e) In making individual and general adjustments of the rent ceiling, the Board shall consider the purposes of this Article and shall specifically consider all relevant factors including but not limited to increases or decreases in property taxes, unavoidable increases or decreases in

operating and maintenance expenses, capital improvement of the controlled rental unit as distinguished from normal repair, replacement and maintenance, increases or decreases in living space, furniture, furnishings or equipment, substantial deterioration of the controlled rental unit other than as a result of ordinary wear and tear, failure on the part of the landlord to provide adequate housing services or to comply substantially with applicable housing, health and safety codes, federal and state income tax benefits, the speculative nature of the investment, whether or not the property was acquired or is held as a long term or short term investment, and the landlords rate of return on investment. It is the intent of this Article that upward adjustments in rent be made only when demonstrated necessary to the landlord making a fair return on investment.

(f) No rent increase shall be authorized by this Article because a landlord has a negative cash flow as the result of refinancing the controlled rental unit if at the time the landlord refinanced the landlord could reasonably have foreseen a negative cash flow based on the rent schedule then in existence within the one year period following refinancing. This paragraph shall only apply to that portion to the negative cash flow reasonably foreseeable within the one year period following refinancing of the controlled rental unit and shall only apply to controlled rental units refinanced after the date of adoption of this Article.

(g) No rent increase shall be authorized by this Article because a landlord has a negative cash flow if at the time the landlord acquired the controlled rental unit, the landlord could reasonably have foreseen a negative cash flow based on the rent schedule then in existence within the one year period following acquisition. This paragraph shall only apply to that portion of the negative cash flow

reasonably foreseeable within the one year period following acquisition of a controlled rental unit and shall only apply to controlled rental units acquired after the date of adoption of this Article.

(h) No landlord shall increase rent under this Section if the landlord:

(1) Has failed to comply with any provision of this Article and/or regulations issued thereunder by the Board, or

(2) Has failed to comply substantially with any applicable state or local housing, health or safety law.

Section 1806. Eviction:

No landlord shall bring any action to recover possession or be granted recovery of possession of a controlled rental unit unless:

(a) The tenant has failed to pay the rent to which the landlord in entitled under the rental housing agreement and this Article.

(b) The tenant has violated an obligation or covenant of his or her tenancy other than the obligation to surrender possession upon proper notice and has failed to cure such violation after having received written notice thereof from the landlord in the manner required by law.

(c) The tenant is committing or expressly permitting a nuisance in, or is causing substantial damage to, the controlled rental unit, or is creating a substantial interference with the comfort, safety, or enjoyment of the landlord or other occupants or neighbors of the same.

(d) The tenant is convicted of using or expressly permitting a controlled rental unit to be used for any illegal purpose.

(e) The tenant, who had a rental housing agreement which has terminated, has refused, after written request or demand by the landlord, to execute a written extension or renewal thereof for a further term of like duration and in such terms as are not inconsistent with or violative of any provisions of this Article and are materially the same as in the previous agreement.

(f) The tenant has refused the landlord reasonable access to the controlled rental unit for the purpose of making necessary repairs or improvements required by the laws of the United States, the State of California or any subdivision thereof, or for the purpose of showing the rental housing unit to any prospective purchaser or mortgagee.

(g) The tenant holding at the end of the term of the rental housing agreement is a sub-tenant not approved by the landlord.

(h) The landlord seeks to recover possession in good faith for use and occupancy of herself or himself, or her or his children, parents, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law.

(i) The landlord seeks to recover possession to demolish or otherwise remove the controlled rental unit from rental residential housing use after having obtained all proper permits from the City of Santa Monica.

Notwithstanding the above provisions, possession shall not be granted if it is determined that the eviction is in retaliation for the tenant reporting violations of this

Article, for exercising rights granted under this Article, including the right to withhold rent upon authorization of the Board under Section 1803(q) or Section 1809 or for organizing other tenants. In any action brought to recover possession of a controlled rental unit, the landlord shall allege and prove compliance with this Section.

Section 1807. Non-waiverability: Any provision, whether oral or written in or pertaining to a rental housing agreement whereby any provision of this Article for the benefit of the tenant is waived, shall be deemed to be against public policy and shall be void.

Section 1808. Judicial Review: A landlord or tenant aggrieved by any action or decision of the Board may seek judicial review by appealing to the appropriate court within the jurisdiction.

Section 1809. Civil Remedies:

(a) Any landlord who demands, accepts, receives, or retains any payment of rent in excess of the maximum lawful rent, in violation of the provisions of this Article or any rule, regulation or order hereunder promulgated, shall be liable as hereinafter provided to the tenant from whom such payments are demanded, accepted, received or retained, for reasonable attorney's fees and costs as determined by the court, plus damages in an amount of five hundred dollars ($500) or three (3) times the amount by which the payment or payments demanded, accepted, received or retained exceeds the maximum lawful rent, whichever is the greater.

(b) In lieu of filing a civil action as provided for in Section 1809(a), the Board shall establish by rule and regulation a hearing procedure similar to that set forth in Section 1805(d) for determination of the amount of the penalty the tenant is entitled to pursuant to Section

1809(a). After said determination, the tenant may deduct the penalty from future rent payments in the manner provided by the Board.

(c) If the tenant from whom such excessive payment is demanded, accepted, received or retained in violation of the foregoing provisions of this Article or any rule or regulation or order hereunder promulgated fails to bring a civil or administrative action as provided for in Section 1809(a) and 1809(b) within one-hundred and twenty (120) days from the date of occurrence of the violation, the Board may settle the claim arising out of the violation or bring such action. Thereafter, the tenant on whose behalf the Board acted is barred from also bringing an action against the landlord in regard to the same violation for which the Board has made a settlement or brought an action. In the event the Board settles said claim, it shall be entitled to retain the costs it incurred in settlement thereof, and the tenant against whom the violation has been committed shall be entitled to the remainder.

(d) The appropriate court in the jurisdiction in which the controlled rental unit affected is located shall have jurisdiction over all actions brought under this Section.

Section 1810. Criminal Remedies. Any landlord violating this Article shall be guilty of a misdemeanor. Any landlord convicted of a misdemeanor under the provisions of this Article shall be punished by a fine of not more than five hundred dollars ($500) or by imprisonment in the county jail for a period not exceeding six months, or by both such fine and imprisonment.

Section 1811. Injunctive Relief. The Board, and tenants and landlords of controlled units, may seek relief from the appropriate court within the jurisdiction within which the affected controlled rental unit is located to

restrain or enjoin any violation of this Article and of the rules, regulations, orders and decisions of the Board.

Section 1812. Partial Invalidity. If any provision of this Article or application thereof to any person or circumstances is held invalid, this invalidity shall not affect other provisions or applications of this Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are declared to be severable. This Article shall be liberally construed to achieve the purposes of this Article and to preserve its validity.

APPENDIX F

APPENDIX F

ARTICLE XVIII. RENT CONTROL

Section 1800. *Statement of Purpose.* A growing shortage of housing units resulting in a low vacancy rate and rapidly rising rents exploiting this shortage constitute a serious housing problem affecting the lives of a substantial portion of those Santa Monica residents who reside in residential housing. In addition, speculation in the purchase and sale of existing residential housing units results in further rent increases. These conditions endanger the public health and welfare of Santa Monica tenants, especially the poor, minorities, students, young families, and senior citizens. The purpose of this Article, therefore, is to alleviate the hardship caused by this serious housing shortage by establishing a Rent Control Board empowered to regulate rentals in the City of Santa Monica so that rents will not be increased unreasonably and so that landlords will receive no more than a fair return.

In order to accomplish this purpose, this Article provides for an elected Rent Control Board to ensure that rents are at a fair level by requiring landlords to justify any rents in excess of the rents in effect one year prior to the adoption of this Article. Tenants may seek rent reductions from the rent in effect one year prior to the adoption of this Article by establishing that those rents are excessive. In addition to giving tenants an opportunity to contest any rent increase, this Article attempts to provide reasonable protection to tenants by controlling removal of controlled rental units from the housing market and by requiring just cause for any eviction from a controlled rental unit.

Through this Article, the City exercises its police power in order to address the serious housing problem recognized in the original enactment of this Rent Control Law in 1979 and still existing in 1984. The 1984 Amendment to the Rent Control Law is intended to clarify the law and ensure that the Rent Control Board possesses adequate and independent authority to carry out its duties. It is intended to ensure due process of law for landlords and tenants, effective remedies for violation of the law, and consistency with constitutional requirements. It is also intended to enable the Board to provide relief to persons facing particular hardship and to protect and increase the supply of affordable housing in the City. Termination or erosion of the protections of this Article would have serious disruptive consequences for persons in need of protection and the supply of affordable housing in the City.

Section 1801. *Definitions.* The following words or phrases as used in this Article shall have the following meanings:

(a) *Board:* The term "Board" refers to the elected Rent Control Board established by this Article.

(b) *Commissioners:* The members of the Board and Interim Board are denominated Commissioners.

(c) *Controlled Rental Units:* All residential rental units in the City of Santa Monica, including mobile homes, and mobile home spaces, and trailers and trailer spaces, except single family homes to the extent provided for in section 1815 and those units found by the Board to be exempt under one or more of the following provisions:

(1) Rental units in hotels, motels, inns, tourist homes and rooming and boarding houses which are rented primarily to transient guests for a period of less than fourteen (14) days.

(2) Rental units in any hospital, convent, monastery, extended medical care facility, asylum, nonprofit home for the aged, or dormitory owned and operated by an institution of higher education.

(3) Rental units which a government unit, agency or authority owns, operates, manages, or in which governmentally subsidized tenants reside only if applicable Federal or State law or administrative regulation specially exempt such units from municipal rent control.

(4) Rental units in owner-occupied dwellings with no more than three (3) units. For purposes of this section:

(i) The term "owner" means a natural person who owns a fifty (50) percent ownership interest in the building and resides on the property as his or her principal place of residence.

(ii) An exemption under this section shall expire by operation of law when the owner ceases to reside on the property as his or her principal place of residence; thereafter, all units on the property shall be subject to all provisions of this Article.

(5) Rental units and dwellings constructed after the adoption of this Article; this exemption does not apply to units created as a result of conversion as opposed to new construction.

(6) Where a unit is actually used for purposes of providing, on a non-profit basis, child care or other residential social services in accordance with applicable laws. This exemption shall expire when the use upon which exemption is based ceases. This exemption shall only apply to units as they become vacant and shall only operate to allow the specified use without the necessity of obtaining a removal permit

under this Article. This exemption shall not be construed to authorize the eviction of any tenant nor to authorize the charging of rent in excess of that permitted under this Article. The Board may adopt regulations to determine whether a unit qualifies for an exemption under this section.

(7) Exemptions are not automatic but shall be granted by the Board upon application by the owner pursuant to Board rules, provided that if the Board does not act upon a completed application for exemption within ninety (90) days of its filing it shall be deemed approved.

(d) *Housing Service:* Housing services include, but are not limited to repairs, maintenance, painting, providing light, hot and cold water, elevator service, window shades and screens, storage, kitchen, bath and laundry facilities and privileges, janitor services, refuse removal, furnishings, telephone, parking, and any other benefit, privilege or facility connected with the use or occupancy of any rental unit. Services to a rental unit shall include a proportionate part of services provided to common facilities of the building in which the rental unit is contained.

(e) *Landlord*: An owner, lessor, sublessor or any other person entitled to receive rent for the use and occupancy of any rental unit, or an agent, representative or successor of any of the foregoing.

(f) *Rent:* All periodic payments and all nonmonetary consideration including but not limited to, the fair market value of goods or services rendered to or for the benefit of the landlord under an agreement concerning the use or occupancy of a rental unit and premises including all payment and consideration demanded or paid for parking, pets, furniture, subletting and security deposits for damages and cleaning.

(g) *Rental Housing Agreement:* An agreement, oral, written or implied, between a landlord and tenant for use or occupancy of a rental unit and for housing services.

(h) *Rental Units:* Any building, structure, or part thereof, or land appurtenant thereto, or any other rental property rented or offered for rent for living or dwelling house units, together with all housing services connected with use or occupancy of such property such as common areas and recreational facilities held out for use by the tenant.

(i) *Tenant:* A tenant, subtenant, lessee, sublessee or any other person entitled under the terms of a rental housing agreement to the use or occupancy of any rental unit.

(j) *Recognized Tenant Organization:* Any group of tenants residing in controlled rental units in the same building or in different buildings operated by the same management company, agent or landlord, who requests to be so designated.

(k) *Rent Ceiling:* Rent ceiling refers to the limit on the maximum allowable rent which a landlord may charge on any controlled rental unit.

(l) *Base Rent Ceiling:* The maximum allowable rent established in Section 1804(b).

(m) *Property:* All rental units on a parcel or lot or contiguous parcels or contiguous lots under common ownership.

(n) *Single Family Home:* A property that has been developed with only one one-family dwelling and any lawful accessory structures, or a lawfully created condominium, stock cooperative or similar unit that is part of a larger residential structure or complex, excepting those

condominiums, stock cooperatives, or similar units converted after April 10, 1979 for which no removal permit or vested right determination has been issued by the Board, and those created pursuant to Article XX of this Charter.

Section 1802. *Integrity and Autonomy of Board.* The Rent Control Board shall be an integral part of the government of the City, but shall exercise its powers and duties under this Article independent of and without interference from the City Council, City Manager, and City Attorney. With respect to the internal organization and affairs of the Board:

(a) *Budget.* The Board shall, prior to July 1 of each year, hold a public hearing on a proposed budget and adopt an annual budget for the ensuing fiscal year. At least thirty-five days prior to the beginning of each fiscal year, the Board's administrator shall submit to the Board the proposed budget as prepared by him or her. After reviewing the same and making such revisions as it may deem advisable, the Board shall determine the time for the holding of a public hearing thereon and shall cause to be published a notice thereof not less than ten days prior to said hearing, by at least one insertion in the official newspaper. Copies of the proposed budget shall be available for inspection by the public in the office of the Board at least ten days prior to said hearing. The City Council and the City Manager shall have no authority to oversee, supervise, or approve this budget. Upon final adoption, the budget shall be in effect for the ensuing fiscal year and the amounts stated therein shall be and become appropriated by the Board for the respective objects and purposes therein specified. At any meeting after the adoption of the budget the Board may amend or supplement the budget by the affirmative votes of at least three

members. Copies of the adopted budget and any amendments or supplements shall be filed with the City Clerk, City Controller, and City Manager. Necessary adjustments to City administrative procedures shall be made.

(b) *Personnel.* Except for the elected or appointed Commissioners, the Administrator, and attorneys employed to represent or advise the Board, all employees of the Board are within the classified civil service of the City. The Board shall appoint an Administrator to administer and supervise the exercise of its powers and duties who shall be directly responsible to the Board. All employees of the Board, except the Administrator and attorneys, shall be hired, terminated, suspended, and demoted in accordance with the provisions of Article XI of the Charter and implementing provisions of the Municipal Code. The Board shall classify employee positions, establish employee salaries and benefits, evaluate the performance of its employees, and be responsible for the layoff and recall of its employees, pursuant to regulations and procedures that it establishes. The Board may enter into and approve a Memorandum of Understanding with representatives of its employees concerning their wages, benefits, hours of work, and terms and conditions of employment in accordance with state law. The City Council shall have no power to abolish positions established or classified by the Board under this Article, notwithstanding any other section of this Charter. Provisions of the Municipal Code and other ordinances or resolutions of the City Council shall not limit the Board's power to adopt regulations and policies and to approve Memorandums of Understanding governing its relationship with its employees under this Section.

(c) *Board Legal Work.* Legal staff hired by the Board shall represent and advise the Board, its Commissioners, and its staff in any civil matters, actions, or proceedings

in which the Board, its Commissioners, or its staff, in or by reason of their official capacity, are concerned or are a party. The Board may, in its sole discretion, and without approval of the City Council, retain private attorneys to furnish legal advice or representation in particular matters, actions or proceedings.

(d) *Contracts and Purchases.* The Board shall comply with the provisions of the City Charter providing for a centralized purchasing system and competitive bidding, and shall procure goods and services as do other City agencies. Provided, however, that the Board shall have sole and final authority to employ attorneys, legislative lobbyists, and other professionals, and to approve contracts for such professional services.

(e) *Conforming Regulations.* If any portion of this Article is declared invalid or unenforceable by decision of a court of competent jurisdiction or rendered invalid or unenforceable by state or federal legislation, the Board and not the City Council shall have authority to enact replacement regulations consistent with the intent and purpose of the invalidated provision and applicable law. Such replacement regulations shall supercede invalidated or unenforceable provisions of this Article to the extent necessary to resolve any inconsistency. The subject matter of such replacement regulations shall be limited to rent control matters as enumerated in this Article.

Section 1803. *Permanent Rent Control Board.*

(a) *Composition:* There shall be in the City of Santa Monica a Rent Control Board. The Board shall consist of five elected Commissioners. The Board shall elect annually as chairperson, one of its members to serve in that capacity.

(b) *Eligibility:* Duly qualified electors of the City of Santa Monica are eligible to serve as Commissioners of the Board.

(c) *Full Disclosure of Holdings:* Candidates for the position of Commissioner shall submit a verified statement listing all of their interests and dealings in real property, including but not limited to its ownership, sale or management, during the previous three (3) years.

(d) *Election of Commissioners:* Commissioners shall be elected at general municipal elections in the same manner as set forth in Article XIV of the Santa Monica Charter, except that the first Commissioners shall be elected at a special municipal election held within ninety (90) days of the adoption of this Article. The elected Commissioners shall take office on the first Tuesday following their election.

(e) *Term of Office:* Commissioners shall be elected to serve terms of four years, beginning on the first Tuesday following their election, except that of the first five Commissioners elected in accordance with Section 1803(d), the two Commissioners receiving the most votes shall serve until April 15, 1985 and the remaining three Commissioners shall serve until April 18, 1983. Commissioners shall serve a maximum of two full terms.

(f) *Powers and Duties:* The Board shall have the following powers and duties:

(1) Set the rent ceilings for all controlled rental units.

(2) Require registration of all controlled rental units under Section 1803(q).

(3) Establish a base rent ceiling on rents under Section 1804(b).

(4) To made adjustments in the rent ceiling in accordance with Section 1805.

(5) Set rents at fair and equitable levels in order to achieve the intent of this Article.

(6) Hire and pay necessary staff, including hearing examiners and personnel to issue orders, rules and regulations, conduct hearings and charge fees as set forth below.

(7) Make such studies, surveys and investigations, conduct such hearings, and obtain such information as is necessary to carry out its powers and duties.

(8) Report annually to the City Council of the City of Santa Monica on the status of controlled rental housing.

(9) Remove rent controls under Section 1803(r).

(10) Issue permits for removal of controlled rental units from rental housing market under Section 1803(t).

(11) Administer oaths and affirmations and subpoena witnesses.

(12) Establish rules and regulations for deducting penalties and settling civil claims under Section 1809.

(13) Refer violations of this Article to appropriate authorities for criminal prosecution.

(14) Seek injunctive and other civil relief under Section 1811.

(15) Charge and collect registration fees, including penalties for late payments.

(g) *Rules and Regulations:* The Board shall issue and follow such rules and regulations, including those which are contained in this Article, as will further the purposes of the Article. The Board shall publicize its rules and regulations prior to promulgation in at least one newspaper of general circulation in the City of Santa Monica. The Board shall hold at least one (1) public hearing to consider the views of interested parties prior to the adoption of general adjustments of the decision to decontrol or reimpose control for any class of rental units under Section 1803(r). All rules and regulations, internal staff memoranda, and written correspondence explaining the decisions, orders, and policies of the Board shall be kept in the Board's office and shall be available to the public for inspection and copying. The Board shall publicize this Article so that all residents of Santa Monica will have the opportunity to become informed about their legal rights and duties under Rent Control in Santa Monica. The Board shall prepare a brochure which fully describes the legal rights and duties of landlords and tenants under Rent Control in Santa Monica. The brochure will be available to the public, and each tenant of a controlled rental unit shall receive a copy of the brochure from his or her landlord.

(h) *Meetings:* The Board shall hold such regularly scheduled meetings as are necessary to ensure the timely performance of its duties under this Article. All regular and special meetings shall be called and conducted in accordance with state law.

(i) *Quorum:* Three Commissioners shall constitute a quorum for the Board.

(j) *Voting:* The affirmative vote of three Commissioners of the Board is required for a decision, including all motions, regulations, and orders of the Board.

(k) *Compensation:* Each Commissioner shall receive for every meeting attended seventy-five dollars ($75.00), but in no event shall any Commissioner receive in any twelve month period more than forty-seven hundred and fifty dollars ($4,750) for services rendered.

(l) *Dockets:* The Board shall maintain and keep in its office all hearing dockets.

(m) *Vacancies:* If a vacancy shall occur on the Board, the Board shall within thirty (30) days appoint a qualified person to fill such a vacancy until the following municipal election when a qualified person shall be elected to serve for the remainder of the term.

(n) *Financing:* The Board shall finance its reasonable and necessary expenses by charging landlords annual registration fees in amounts deemed reasonable by the Board. The Board may direct that all or part of such fees may be passed through from landlords to tenants and may establish applicable conditions and procedures. The Board is also empowered to request and receive funding when and if necessary from any available source for its reasonable and necessary expenses.

(o) *Recall:* Commissioners may be recalled in accordance with the provisions of Article XIV of the Santa Monica Charter.

(p) *Staff:* The Board shall employ and pay such staff, including hearing examiners and inspectors, as may be necessary to perform its function efficiently in order to fulfill the purpose of this Article.

(q) *Registration:* Within sixty (60) days after the adoption of this Article, the Board shall require the registration of all controlled rental units, which shall be re-registered at times deemed appropriate by the Board. The initial registration shall include the rent in effect at the time on the date of the adoption of this Article, base

rent ceiling, the address of the rental unit, the name and address of the landlord, the housing services provided to the unit, a statement indicating all operating cost increases since the base rent ceiling date, and any other information deemed relevant by the Board. The Board shall require the landlord to report vacancies in the controlled rental units and shall make a list of vacant controlled rental units available to the public. If the Board, after the landlord has proper notice and after a hearing, determines that a landlord has wilfully and knowingly failed to register a controlled rental unit, the Board may authorize the tenant of such a non-registered controlled rental unit to withhold all or a portion of the rent for the unit until such time as the rental unit is properly registered. After a rental unit is properly registered, the Board shall determine what portion, if any, of the withheld rent is owed to the landlord for the period in which the rental unit was not properly registered. Whether or not the Board allows such withholding, no landlord who has failed to register properly shall at any time increase rents for a controlled rental unit until such units are properly registered.

(r) *Decontrol:* If the average annual vacancy rate in any category, classification, or area of controlled rental units exceeds five (5) percent, the Board is empowered, at its discretion and in order to achieve the objectives of this Article, to remove rent controls from such category, classification or area. The Board may determine such categories, classifications, or areas for purposes of decontrol consistent with the objectives of this Article. In determining the vacancy rate for any category, classification or area of controlled rental units, the Board shall consider all available data and shall conduct its own survey. If units are decontrolled pursuant to this subsection, controls shall be reimposed if the Board finds that the average annual vacancy rate has thereafter fallen

below five (5) percent for such category, classification or area.

(s) *Security Deposits:* Any payment or deposit of money the primary function of which is to secure the performance of a rental agreement or any part of such agreement, including an advance payment of rent, shall be placed in an interest bearing account at a federally insured financial institution until such time as it is returned to the tenant or entitled to be used by the landlord. Unless and until the Board enacts regulations directing that the interest on such accounts be paid directly to the tenant, the landlord may either pay such interest directly to the tenant or use it to offset operating expenses, in which case the offset shall be a factor in making individual rent adjustments under Section 1805. The Board may regulate the amount and use of security deposits consistent with the purposes of this Article and state law.

(t) *Removal of Controlled Unit From Rental Housing Market:*

(1) Any landlord who desires to remove a controlled rental unit from the rental housing market by demolition, conversion or other means is required to obtain a permit from the Board prior to such removal from the rental housing market in accordance with rules and regulations promulgated by the Board. In order to approve such a permit, the Board is required to find that the landlord cannot make a fair return by retaining the controlled rental unit.

(2) Notwithstanding the foregoing provisions of this subsection, the Board may approve such a permit:

(i) If the Board finds that the controlled rental unit is uninhabitable and is incapable of being

made habitable in an economically feasible manner, or

(ii) If the permit is being sought so that the property may be developed with multifamily dwelling units and the permit applicant agrees as a condition of approval, that the units will not be exempt from the provisions of this Article pursuant to Section 1801(c) and that at least fifteen (15) percent of the controlled rental units to be built on the site will be at rents affordable by persons of low income.

(3) The Housing Element of the General Plan of the City of Santa Monica shall at all times contain a provision that neither the City Council nor any City agency shall approve an application for tentative subdivision map or tentative parcel map for a converted unit until and unless the applicant first obtains a removal permit as required by this Section. This subsection shall not apply to any tentative subdivision map or tentative parcel map approved in accordance with Article XX relating to tenant ownership rights.

(4) The Board shall render its final decision within one hundred and twenty (120) days of the filing of a completed application under this section.

Section 1804. *Maximum Allowable Rents.*

(a) *Temporary Freeze:* Rents shall not be increased during the one-hundred-twenty (120) day period following the date of adoption of this Article.

(b) *Establishment of Base Rent Ceiling:* Beginning one-hundred-twenty days after the adoption of this Article, no landlord shall charge rent for any controlled rental units in an amount greater than the rent in effect on the date one year prior to the adoption of this Article. The

rent in effect on that date is the base rent ceiling and is a reference point from which fair rents shall be adjusted upward or downward in accordance with Section 1805. If there was no rent in effect on the date one year prior to the adoption of this Article, the base rent ceiling shall be the rent that was charged on the first date that rent was charged following the date one year prior to the adoption of this Article.

(c) *Posting:* As soon as the landlord is aware of the maximum allowable rent, the landlord shall post it for each unit in a prominent place in or about the affected controlled rent units. The Board may require that other information it deems relevant also be posted.

Section 1805. *Individual and General Adjustment of Ceilings on Allowable Rents.*

(a) *General Adjustment:* The Board may, after holding those public hearings prescribed by Section 1803(g), set and adjust upward or downward the rent ceiling for all controlled rental units in general and/or for particular categories of controlled rental units deemed appropiate by the Board. Such an adjustment, however, need not take effect immediately, and the Board may decide that new rent ceilings shall not take effect until some reasonable date after the above-stated time periods.

(b) *Annual General Adjustment:* Each year the Board shall generally adjust rents as follows:

(1) Adjust rents upward by granting landlords a utility and tax increase adjustment for actual increases in the City of Santa Monica for taxes and utilities.

(2) Adjust rents upward by granting landlords a maintenance increase adjustment for actual increases in the City of Santa Monica for maintenance expenses.

(3) Adjust rents downward by requiring landlords to decrease rents for any actual decreases in the City of Santa Monica for taxes.

In adjusting rents under this subsection, the Board shall adopt a formula of general application.

(c) *Petitions:* Upon receipt of a petition by a landlord and/or a tenant, the maximum rent of individual controlled rental units may be adjusted upward or downward in accordance with the procedures set forth elsewhere in this Section. The petition shall be on the form provided by the Board and shall include a declaration by the landlord that the unit meets all requirements of Section 1805(h). Notwithstanding any other provision of this Section, the Board or hearing examiner may refuse to hold a hearing and/or grant a rent adjustment if an individual hearing has been held and decision made with regard to maximum rent within the previous six months.

(d) *Hearing Procedure:* The Board shall enact rules and regulations governing hearings and appeals of individual adjustment of ceilings on allowable rents which shall include the following:

(1) *Hearing Examiner:* A hearing examiner appointed by the Board shall conduct a hearing to act upon the petition for individual adjustment of ceilings on allowable rents and shall have the power to administer oaths and affirmations.

(2) *Notice:* The Board shall notify the landlord if the petition was filed by the tenant, or the tenant, if the petition was filed by the landlord, of the receipt of such a petition and a copy thereof.

(3) *Time of Hearing:* The hearing officer shall notify all parties, as to the time, date and place of the hearing.

(4) *Records:* The hearing examiner may require either party to a rent adjustment hearing to provide it with any books, records and papers deemed pertinent in addition to that information contained in registration statements. The hearing examiner shall conduct a current building inspection and/or request the City to conduct a current building inspection if the hearing examiner finds good cause to believe the Board's current information does not reflect the current condition of the controlled rental unit. The tenant may request the hearing examiner to order such an inspection prior to the date of the hearing. All documents required under this Section shall be made available to the parties involved prior to the hearing at the office of the Board. In cases where information filed in a petition for rent ceiling adjustment or in additional submissions filed at the request of the hearing examiner is inadequate or false, no action shall be taken on said petition until the deficiency is remedied.

(5) *Open Hearings:* All rent ceiling adjustment hearings shall be open to the public.

(6) *Right of Assistance:* All parties to a hearing may have assistance in presenting evidence and developing their position from attorneys, legal workers, recognized tenant organization representatives or any other persons designated by said parties.

(7) *Hearing Record:* The Board shall make available for inspection and copying by any person an official record which shall constitute the exclusive record for decision on the issues at the hearing. The record of the hearing, or any part of one, shall be obtainable for the cost of copying. The record of the hearing shall include: all exhibits, papers and documents required to be filed or accepted into evidence

during the proceedings; a list of participants present; a summary of all testimony accepted in the proceedings; a statement of all materials officially noticed; all recommended decisions; orders and/or rulings; all final decisions, orders and/or rulings, and the reasons for each final decision, order and/or ruling. Any party may have the proceeding tape recorded or otherwise transcribed at his or her own expense.

(8) *Quantum of Proof and Notice of Decision:* No individual adjustment shall be granted unless supported by the preponderance of the evidence submitted at the hearing. All parties to a hearing shall be sent a notice of the decision and a copy of the findings of fact and law upon which said decision is based. At the same time, parties to the proceeding shall also be notified of their right to any appeal allowed by the Board and/or to judicial review of the decision pursuant to this Section and Section 1808 of this Article.

(9) *Consolidation:* All landlord petitions pertaining to tenants in the same building will be consolidated for hearing, and all petitions filed by tenants occupying the same building shall be consolidated for hearing unless there is a showing of good cause not to consolidate such petitions.

(10) *Appeal:* Any person aggrieved by the decision of the hearing examiner may appeal to the Board. On appeal, the Board shall affirm, reverse or modify the decision of the hearing examiner. The Board may conduct a de novo hearing or may act on the basis of the record before the hearing examiner without holding a hearing.

(11) *Finality of Decision:* The decision of the hearing examiner shall be the final decision of the

Board in the event of no appeal to the Board. The decision of the hearing examiner shall not be stayed pending appeal; however, in the event that the Board on appeal reverses or modifies the decision of the hearing examiner, the landlord, in the case of an upward adjustment in rent, or the tenant, in the case of a downward adjustment of rent, shall be ordered to make retroactive payments to restore the parties to the position they would have occupied had the hearing examiner's decision been the same as that of the Board.

(12) *Time for Decision:* The rules and regulations adopted by the Board shall provide for final action on any individual rent adjustment petition within one-hundred and twenty (120) days, following the date of filing of the individual rent adjustment petition.

(13) *Board Action in Lieu of Reference to Hearing Examiner:* The Board, on its own motion or on the request of any landlord or tenant, may hold a hearing on an individual petition for rent adjustment without the petition first being heard by a hearing examiner.

(14) Decisions decreasing rents shall remain in effect until the Board finds that the landlord has corrected the defect warranting the decrease. The Board shall, by regulation, establish procedures for making prompt compliance determinations. Upon a determination of compliance the landlord shall be entitled to reinstatement of the prior rent level, retroactive to the date that the landlord corrected the defect which warranted the decrease.

(e) In making individual and general adjustments of the rent ceiling, the Board shall consider the purposes of this Article and the requirements of law. The Board may

adopt as its fair return standard any lawful formula, including but not limited to one based on investment or net operating income. The Board shall consider all factors relevant to the formula it employs; such factors may include: increases or decreases in operating and maintenance expenses, the extent of utilities paid by the landlord, necessary and reasonable capital improvement of the controlled rental unit as distinguished from normal repair, replacement and maintenance, increases or decreases in living space, furniture, furnishings, equipment, or services, substantial deterioration of the controlled rental unit other than as a result of ordinary wear and tear, failure on the part of the landlord to provide adequate housing services or to comply substantially with applicable housing, health and safety codes, federal and state income tax benefits, the speculative nature of the investment, whether or not the property was acquired or is held as a long term or short term investment, the landlord's rate of return on investment, the landlord's current and base date Net Operating Income, and any other factor deemed relevant by the Board in providing the landlord a fair return.

(f) No rent increase shall be authorized by this Article because a landlord has a negative cash flow as the result of refinancing the controlled rental unit if at the time the landlord refinanced the landlord could reasonably have foreseen a negative cash flow based on the rent schedule then in existence within the one year period following refinancing. This paragraph shall only apply to that portion of the negative cash flow reasonably foreseeable within the one year period following refinancing of the controlled rental unit and shall only apply to controlled rental units refinanced after the date of adoption of this Article.

(g) No rent increase shall be authorized by this Article because a landlord has a negative cash flow if at the time the landlord acquired the controlled rental unit, the landlord could reasonably have foreseen a negative cash flow based on the rent schedule then in existence within the one year period following acquisition. This paragraph shall only apply to that portion of the negative cash flow reasonably foreseeable within the one year period following acquisition of a controlled rental unit and shall only apply to controlled rental units acquired after the date of adoption of this Article.

(h) No landlord shall increase rent under this Article if the landlord:

(1) Has failed to comply with any provision of this Article and/or regulations issued thereunder by the Board, including the provisions requiring the payment of registration fees and registration penalties.

(2) Has failed to comply substantially with any applicable state or local housing, health or safety law. No landlord shall increase rent unless the notice increasing rent contains a statement in substantially the following form: "The undersigned (landlord) certifies that this unit and common areas are not subject to any uncorrected citation or notices of violation of any state or local housing health, or safety laws issued by any government official or agency." If a landlord fails to comply with this subsection, the tenant may refuse to pay the improperly noticed increase, may seek administrative or civil remedies under this Article, and may raise the landlord's noncompliance as an affirmative defense in any resulting unlawful detainer action.

(i) The Board may, in its discretion, enact regulations to provide for increases of rents on units voluntarily vacated after the effective date of this subsection in properties where the landlord has dedicated a percentage of units to be rented to persons of very low or low income at affordable rents. The Board may enact procedures and other regulations governing determination of the conditions upon which such increases will be permitted, the extent of the increases, the required mix of affordable units to be provided, ways to ensure the continued provision of affordable housing under this subsection, the terms and conditions applicable when landlords cease to participate or when tenants vacate or cease to qualify for units dedicated to affordable housing, and other measures it deems necessary.

If the Board enacts regulations under this subsection, it shall provide for the following:

(1) That a property shall not be eligible for this program unless a specified percentage of all units on the property, no less than fifteen (15) percent, will be occupied by tenants of very low or low income and the rent on each unit so occupied does not exceed a specified percentage, no greater than thirty (30) percent, of such tenants' income.

(2) That tenants of very low or low income occupying units maintained at affordable rent levels under this program are protected if the landlord elects not to participate further in the program. Such protection shall include, at a minimum, a provision prohibiting the rent of such tenants from being increased by a percentage greater than the general annual adjustment allowed by the Board even if the resulting rent is below the maximum allowable rent and the landlord has lowered the rent for other units on the property.

Section 1806. *Eviction.* No landlord shall take action to terminate any tenancy including service of any notice to quit or other eviction notice or bring any action to recover possession or be granted recovery of possession of a controlled rental unit unless:

(a) The tenant has failed to pay the rent to which the landlord is entitled under the rental housing agreement and this Article.

(b) The tenant has violated an obligation or covenant of his or her tenancy other than the obligation to surrender possession upon proper notice and has failed to cure such violation after having received written notice thereof from the landlord in the manner required by law.

(c) The tenant is committing or expressly permitting a nuisance in, or is causing substantial damage to, the controlled rental unit, or is creating a substantial interference with the comfort, safety, or enjoyment of the landlord or other occupants or neighbors of the same.

(d) The tenant is convicted of using or expressly permitting a controlled rental unit to be used for any illegal purpose.

(e) The tenant, who had a rental housing agreement which had terminated, has refused, after written request or demand by the landlord, to execute a written extension or renewal thereof for a further term of like duration and in such terms as are not inconsistent with or violative of any provisions of this Article and are materially the same as in the previous agreement.

(f) The tenant has refused the landlord reasonable access to the controlled rental unit for the purposes of making necessary repairs or improvements required by the laws of the United States, the State of California or any subdivision thereof, or for the purpose of showing the rental housing to any prospective purchaser or mortgagee.

(g) The tenant holding at the end of the term of the rental housing agreement is a sub-tenant not approved by the landlord.

(h) The landlord seeks to recover possession in good faith for use and occupancy by herself or himself, or her or his children, parents, grandparents, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law. For purposes of evictions under this subsection:

(1) A "landlord" shall be defined as a natural person who has at least a fifty (50) percent ownership interest in the property.

(2) No eviction may take place if any landlord or enumerated relative already occupies one unit on the property, or if a vacancy already exists on the property and the vacant unit is comparable to the unit for which eviction is sought. Where the vacant unit is determined not to be comparable, thereby permitting eviction under this subsection, the evicted tenant or tenants shall be first given the right to occupy the vacant unit and the rent thereof shall be the lesser of the maximum allowable rent for the vacant unit and the maximum allowable rent of the unit from which the tenant or tenants are evicted. The Rent Control Board shall promulgate regulations defining when a unit is comparable for purposes of this paragraph.

(3) The notice terminating tenancy shall contain the name, address and relationship to the landlord of the person intended to occupy.

(4) The landlord or enumerated relative must intend in good faith to move into the unit within thirty (30) days after the tenant vacates and to occupy the unit as a primary residence for at least one year. The Board may adopt regulations governing the determination of good faith.

(5) If the landlord or relative specified on the notice terminating tenancy fails to occupy the unit within thirty (30) days after the tenant vacates, the landlord shall:

(i) Offer the unit to the tenant who vacated it.

(ii) Pay to said tenant all reasonable expenses incurred in moving to and/or from the unit.

(6) No eviction pursuant to this subsection shall be allowed in any condominium or stock cooperative unit which has been converted from an apartment or other rental unit after April 10, 1979, unless the Rent Control Board has issued a removal permit or declared a vested right for said unit. As used in this subpart, a unit shall be deemed converted after April 10, 1979, if on April 10, 1979, the recorded tract map or parcel map for the property showed the unit as included in the property.

(i) The landlord seeks to recover possession to demolish or otherwise remove the controlled rental unit from rental residential housing use after having obtained all proper permits from the City of Santa Monica.

Notwithstanding the above provisions, possession shall not be granted if it is determined that the eviction is in retaliation for the tenant reporting violations of this Article, for exercising rights granted under this Article, including the right to withhold rent upon authorization of the Board under Section 1803(q) or Section 1809 or for organizing other tenants. In any notice purporting to terminate tenancy the landlord shall state the cause for the termination, and in any action brought to recover possession of a controlled rental unit, the landlord shall allege and prove compliance with this Section.

Any violation of this Section shall render the landlord liable to the tenant in a civil action for actual and punitive damages. The prevailing party in an action based upon this Section shall recover costs and attorney's fees.

Section 1807. *Non-waiverability:* Any provision, whether oral or written in or pertaining to a rental housing agreement whereby any provision of this Article for the benefit of the tenant is waived, shall be deemed to be against public policy and shall be void.

Section 1808. *Judicial Review:* A landlord or tenant aggrieved by any action or decision of the Board may seek judicial review by appealing to the appropriate court within the jurisdiction.

Section 1809. *Civil Remedies:*

(a) Any landlord who demands, accepts, receives, or retains any payment of rent in excess of the maximum lawful rent, in violation of the provisions of this Article or any rule, regulation or order hereunder promulgated, including the provisions ensuring compliance with habitability standards and registration fee requirements, shall be liable in a civil action to the tenant from whom such payments are demanded, accepted, received or retained,

for reasonable attorney's fees and costs as determined by the court, plus damages in the amount by which the payment or payments demanded, accepted, received or retained exceeds the maximum lawful rent. A civil penalty of treble the amount by which the payment or payments demanded, accepted, received or retained exceeds the maximum lawful rent shall be awarded against the landlord upon a showing that the landlord has acted willfully or with oppression, fraud or malice. No administrative remedy need be exhausted prior to filing suit pursuant to this subsection.

(b) In lieu of filing a civil action, a tenant may file an administrative complaint. The Board shall establish by rule and regulation a hearing procedure similar to that set forth in Section 1805(d).

(1) The rules and regulations adopted by the Board shall provide for final Board action on any complaint for excess rent within one-hundred and twenty (120) days following the date of filing of the complaint.

(2) In any administrative hearing under this Section, a landlord who demands, accepts, receives or retains any payment of rent in excess of the maximum lawful rent shall be liable for damages in the amount by which the payment or payments demanded, accepted, received or retained exceeds the maximum lawful rent and may be liable for an additional amount not to exceed Five Hundred Dollars ($500), for costs, expenses incurred in pursuing the hearing remedy, damages and penalties. The tenant shall bear the burden of proving entitlement to the penalty. The tenant may deduct the penalty and award of damages from future rent payments in the manner provided by the Board. An order authorizing rent withholding under this Article shall survive the

sale or other transfer of the property and shall be binding upon successors of the landlord against whom the order was made. If a tenant authorized to withhold rent under this Article vacates the property, the landlord shall pay to such tenant a sum equal to the balance of the rent that the tenant could have withheld.

(c) If the tenant from whom such excessive payment is demanded, accepted, received or retained in violation of the foregoing provisions of this Article or any rule or regulation or order hereunder promulgated fails to bring a civil or administrative action as provided for in Section 1809(a) and 1809(b) within one hundred and twenty (120) days from the date of occurrence of the violation, the Board may settle the claim arising out of the violation or bring such action. Thereafter, the tenant on whose behalf the Board acted is barred from also bringing an action against the landlord in regard to the same violation for which the Board has made a settlement or brought action. In the event the Board settles said claim, it shall be entitled to retain the costs it incurred in settlement thereof, and the tenant against whom the violation has been committed shall be entitled to the remainder.

(d) The appropriate court in the jurisdiction in which the controlled rental unit affected is located shall have jurisdiction over all actions brought under this Section.

Section 1810. *Criminal Remedies.* Any landlord violating this Article shall be guilty of a misdemeanor. Any landlord convicted of a misdemeanor under the provisions of this Article shall be punished by a fine of not more than five hundred dollars ($500) or by imprisonment in the county jail for a period not exceeding six months, or by both such fine and imprisonment.

Section 1811. *Injunctive and Other Civil Relief.* The Board, and tenants and landlords of controlled units, may seek relief from the appropriate court within the jurisdiction within which the affected controlled rental unit is located to enforce any provision of this Article or its implementing regulations or to restrain or enjoin any violation of this Article and of the rules, regulations, orders and decisions of the Board.

Section 1812. *Partial Invalidity.* If any provision of this Article or application thereof to any person or circumstances is held invalid, this invalidity shall not affect other provisions or applications of this Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are declared to be severable. This Article shall be liberally construed to achieve the purposes of this Article and to preserve its validity.

Section 1813. *Relationship to Article XX.* Section 1803(t) of this Article shall not apply to any building for which approval has been received pursuant to Article XX (Tenant Ownership Rights Charter Amendment) of this Charter. All other provisions of this Article, however, shall continue to apply with full force and effect to each unit in any building receiving approval pursuant to Article XX. Tenants residing in such units, whether or not "qualifying," "participating," or any other such designation under Article XX, shall enjoy all the rights and remedies provided by this Article without limitation as to duration or to ownership of the unit. This Section is declarative of existing law and does not impose any new requirements or limit any existing ones.

Section 1814. *Existing Board Practices.* To the extent that the amendments to Article XVIII adopted at the same time as this Section incorporate rules, regulations and practices of the Rent Control Board existing on the

date of the adoption hereof, this amendment is declarative of existing law and does not impose any new requirements or limit any existing ones.

Section 1815. *Single Family Homes.* Single Family homes that were used for residential purposes on July 1, 1984 are automatically exempt from the provisions of this Article. Single family homes that are not exempt under the preceding sentence are subject to all requirements of this Article, but shall be permanently exempted by the Board upon proof that the home has been continuously occupied by the owner for a period of two years as a principal place of residence after voluntary vacancy by the tenant or lawful eviction of the tenant. An owner may have only one exemption under this Section at any one time.

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No. 84-1168

In the Supreme Court of the United States

OCTOBER TERM, 1984

JEROME J. NASH

Appellant,

v.

CITY OF SANTA MONICA, et al.,

Appellees.

ON APPEAL FROM SUPREME COURT OF
THE STATE OF CALIFORNIA

MOTION TO DISMISS

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QUESTION PRESENTED

Whether the rational basis test should be abandoned and a new fundamental right created in land use cases involving demolition restrictions.

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No. 84-1168

In the Supreme Court of the United States

OCTOBER TERM, 1984

JEROME J. NASH,

Appellant,

v.

CITY OF SANTA MONICA, et al.,

Appellees.

MOTION TO DISMISS

Appellees City of Santa Monica and Santa Monica Rent Control Board move, pursuant to Supreme Court Rule 16, to dismiss the appeal filed herein by Appellant Jerome Nash ("Nash") for want of a substantial federal question.

STATEMENT OF THE CASE

This case involves a challenge to local government regulation of land use. Yet, in an abrupt departure from settled principles, appellant wholly avoids the issue of the regulation's economic impact. Despite Nash's contention, this case does not involve any fundamental "right to go out of business." Rather, the demolition restriction concerns only the existing use of land, which Nash seeks to change for increased profit. Thus, appellant not only rejects the most obvious and common manner of ceasing business—sale—he fails even to discuss its consequences. Instead,

appellant distorts the customary analytical framework for economic regulation cases and attempts to resurrect long-discarded theories of liberty interests in property. This would undo the controlling decision of *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978), and *Fresh Pond Shopping Center v. Callahan,* ____ U.S. ____, 104 S.Ct. 218 (1983), and threaten the cornerstone principles of *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926), and *Nebbia v. New York,* 291 U.S. 502, 531 (1934).

In the late 1970's the City of Santa Monica was confronted with a shortage of its traditionally scarce housing stock, aggravated by a "Demolition Derby" in which Santa Monica landlords razed over 1,300 rental units and converted hundreds of other apartments to condominiums, dislocating up to 5% of the City's population in a 15 month period. Housing units were demolished at 10 times the rate (relative to population) of neighboring Los Angeles.[1]

In response to the housing crisis, the citizens of Santa Monica by initiative added Article XVIII to the City Charter in 1979. This law provides for a rent control board ("the Board") with the authority to regulate rent increases and to control the removal of rental units from the housing market through demolition and conversion. The law also prohibits evictions except for specified cause.

The primary means of preserving scarce rental housing is Section 1803(t).[2] This section requires a landlord to obtain a "removal permit" prior to demolition. A permit

[1]The rental housing crisis has been noted and documented by Congress. *See* Condominium and Cooperative Conversion Protection and Abuse Relief Act, 15 U.S.C. § 3601 et seq., P.L. 96-399(94 Stat. 1672).

[2]Jurisdictional Statement ("J.S.") Appendix F, pp. 14-15. Section references are to the Santa Monica City Charter unless specified otherwise.

will be granted if either (1) the property is not habitable, (2) the landlord wishes to rebuild rental housing, or (3) the owner cannot make a reasonable return on investment.

A year before the Rent Control Law was enacted, Nash, a minor, purchased a 6 unit apartment building in Santa Monica. However, after the enactment of the law, Nash became dissatisfied:

> There is only one thing I want to do, and that is to evict the group of ingrates inhabiting my units, tear down the building, and hold on to the land until I can sell it at a price which will not mean a ruinous loss on my investment. J.S. A-4.

Although Nash began the process of obtaining a removal permit, he abandoned his application and filed a petition for writ of mandate in the Los Angeles Superior Court.[3] At trial, Nash admitted that the rentals provided a fair return on his investment in the property. He further conceded that demolition of the building would adversely affect the supply of housing in Santa Monica. J.S. A-5.

The trial court accepted Nash's argument that Section 1803(t) operated to deprive him of property without due process of law. It also declared, *sua sponte,* that Section 1803(t) resulted in a taking of his property without just compensation. It ordered that a writ of mandate issue commanding the City and the Board to grant Nash a removal permit for his property.

On appeal, Nash abandoned any claim based on a taking of his property. The Court of Appeal affirmed, finding a violation of the due process clause of Article I, Section 7(a) of the California Constitution (J.S. B-12).

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[3]Although Nash contends that the removal permit process is illusory (J.S. at 3), he made no showing other than the concession that he could not qualify for a permit. Further, Nash made no showing that the removal permit procedures are defective or inadequate.

The California Supreme Court reversed. It held that Section 1803(t), as applied to Nash, was constitutional. The majority found that the burden on Nash's asserted liberty interest by the demolition controls of Section 1803(t) was minimal and indirect and did not "warrant departure from the traditional tests used to determine the validity of economic regulation." J.S. A-8.

The court further held that the law did not impinge on any right to retain or sell property and was reasonably related to the legitimate goal of maintaining adequate rental housing. J.S. A-8. Chief Justice Bird, in a separate opinion, expressed the view that strict scrutiny was warranted but concluded that Section 1803(t) served a compelling governmental interest. J.S. A-18. Two justices dissented, primarily on grounds stated in the opinion of the Court of Appeal. J.S. A-20, 25. This appeal followed.

In June, 1984, after the cause was argued to the California Supreme Court, the electorate amended the City Charter by addition of Article XX, which permits conversion of apartments to condominiums, notwithstanding Section 1803(t), when the owner and two-thirds of the tenants agree. Section 1813, J.S. F-30. In November, 1984, the City Charter was further amended by the electorate to eliminate several requirements for a removal permit. See J.S. F-14[4] Neither of these amendments were before the lower courts, but they constitute the law currently applicable to appellant.

INTRODUCTION

The electorate of Santa Monica has determined, based on a finding of necessity, to preserve existing rental

[4]Prior to its amendment in November, 1984, Section 1803(t) required the Board to find, where removal was sought because of an inability to earn a fair return, that (1) the building was not occupied by persons of low or moderate income, (2) could not be afforded by persons of low or moderate income, and (3) removal would not adversely affect the housing supply. J.S. E-10-11.

properties from destruction without cause. Although Nash claims that the demolition law restricts his personal liberty interests, the California Supreme Court correctly observed that "the actual limitation upon those interests . . . is minimal and not significantly different from other constitutionally permissible limitations upon the use of private property." J.S. A-2.

The California Supreme Court found that the demolition law imposed no compulsory servitude sufficient to invoke the Thirteenth Amendment. J.S. A-6. It rejected the Court of Appeal's creation of a new fundamental right predicated on earlier California cases involving the right to pursue a livelihood. *Id.* The decision is manifestly correct. Demolition restrictions do not impair any fundamental rights, nor do they require departure from traditional due process analysis of economic regulation. *Cf. Nebbia v. New York*, 291 U.S. 502, 531 (1934).

Demolition restrictions have been uniformly analyzed as land use regulations and upheld as valid exercises of the police power. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). A non-discriminatory municipal land use regulation is valid unless it does not substantially advance legitimate state interests (*Nectow v. Cambridge*, 277 U.S. 183 (1928)), or denies a property owner economically viable use of his property without compensation. (*Agins v. City of Tiburon*, 447 U.S. 255 (1980)).

Appellant's characterization of this case as one involving personal liberties is nothing more than a subterfuge to avoid a "taking" analysis. He must do so because he offered no evidence that a taking occurred and conceded the taking issue. Nowhere does Nash claim that appellees interfere with the existing use of his property; rather, he complains of his inability to change that use. Accordingly, this case is controlled by *Fresh Pond Shopping Center v.*

Callahan. ____ U.S. ____, 104 S.Ct. 218 (1983), wherein this Court dismissed for want of a substantial federal question a challenge to demolition controls virtually identical to those at issue here.

The dissent below, upon which Nash relies, framed the "fundamental interest" involved as the right to go out of business while simultaneously keeping the land for future development or use. J.S. A-29. As thus framed, this "personal liberty right" is actually an economic right with purely economic consequences. But if this "right" is sufficient to invoke strict scrutiny, it would enable any property owner to use his land adverse to the public health and welfare as determined by the legislature.

The elevation of the desires of a property owner for maximum profit to that of a fundamental personal liberty, coupled with strict scrutiny of land use laws to which courts have historically deferred, is an aberrant approach to constitutional law. At a minimum, the creation of a penumbral "right to go out of business" calls into question historic preservation legislation enacted by "all 50 states and by over 500 municipalities." *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 107 (1978).

Nash cannot make out a claim under the Fifth, Thirteenth, or Fourteenth Amendments to the United States Constitution. Instead, he has pressed for creation of a state right which the California Supreme Court properly rejected and which is inadequate to invoke this Court's jurisdiction.

ARGUMENT

I.

THE DECISION RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS

The Jurisdictional Statement fails to satisfy the requirements of Supreme Court Rule 15(d) in that it does not specify in what manner a federal constitutional issue was

raised or adjudicated by the state courts. In addition, since Nash failed to seek a removal permit, the as-applied challenge he pressed in the California courts (J.S. A-1) is not cognizable here. *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980); *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141, 1146 (9th Cir. 1983). Finally, the judgment of the California Supreme Court rests on adequate and independent state grounds.

The Court of Appeal identified the "personal liberty interest" that Nash advances as grounded in state law.[5] Accordingly, it based its decision solely on Article I, Section 7(a) of the state constitution. J.S. B-4,12. Indeed, the opinion cites only two federal authorities, neither for the purpose of identifying any federal right. J.S. B-5,9. That opinion was adopted *in toto* by the dissent below. J.S. A-25.

The "right" identified by the Court of Appeal was seen as the corollary to the "right to work for a living in the common occupations of the community," citing *Sail'er Inn v. Kirby,* 5 Cal.3d 1, 485 P.2d 529, 95 Cal.Rptr. 329 (1971), a judicially created state right. J.S. B-7.[6]

This Court, in *Fresh Pond Shopping Center v. Callahan,* ___ U.S. ___, 104 S.Ct. 218 (1983), determined there

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[5]The judgment of the Superior Court was based on due process and takings analysis (since abandoned), not on any supposed liberty interest. *See* J.S. C-6; *ante,* p. 3.

[6]The California Supreme Court has consistently construed the state constitution as providing greater protection of personal interests than does the federal constitution. *See, e.g., Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 84 (1980) (speech); *Committee to Defend Reproductive Rights v. Myers,* 29 Cal.3d 252, 625 P.2d 779, 172 Cal.Rptr. 866 (1981) (privacy); *City of Santa Barbara v. Adamson,* 27 Cal.3d 123, 610 P.2d 436, 164 Cal.Rptr. 539 (1980) (association). Accordingly, it would be anomalous for this Court to find Nash's purported liberty interest protected by the Thirteenth Amendment after his claim based on the "heightened" protections of the California Constitution has been rejected.

was no substantial federal question presented by a due process challenge to a virtually identical demolition ordinance enacted by Cambridge, Massachusetts. Thus, both the majority and dissenting opinions below proceeded to analyze Nash's claim under the California Constitution. J.S. A-15,23 ("we are free as was Massachusetts in [Fresh Pond], to decide the present issue entirely on the basis of state authority" (Mosk, J., dissenting)).

Since it fairly appears that the courts below rested their decisions primarily on state law, this Court should not undertake to review this case. *Michigan v. Long,* 463 U.S. 1032 (1983).

II.

THERE IS NO IMPORTANT FEDERAL QUESTION

The decision below is so obviously correct as not to warrant further review. It is squarely within the body of precedent upholding price control and land use regulations ranging from *Munn v. Illinois*, 94 U.S. 113 (1877) to *Agins v. City of Tiburon,* 447 U.S. 255 (1980). Nash did not suffer a "taking" of his property under *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978). He can rent his property at a fair return or sell the building at fair value.[7] His "bundle" of property rights has not been destroyed or "cut across." *Cf. Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982).[8] He simply cannot arbitrarily evict his tenants and demolish their homes.

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[7]Since there is no showing in the record to the contrary, it must be assumed that Nash can freely sell his property for fair value.

[8]*Loretto* recognizes the local government's "broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." 458 U.S. at 440.

Experiencing an acute shortage of vacancies exacerbated by rapid depletion of housing, Santa Monica's response was a proper — indeed necessary — exercise of the police power.[9] As Justice Holmes observed in *Block v. Hirsh*, 256 U.S. 135 (1921): "Housing is a necessity of life. All the elements of a public interest justifying some degree of public control are present." *Id.* at 156.

Yet Nash asserts that he has a liberty interest in "going out of business" protected by the "penumbra" of the Thirteenth Amendment. The City contends that Nash's interest is classically economic and measured by traditional due process analysis. Attempts to elevate rights in property to fundamental personal liberty interests were rejected by this Court nearly 60 years ago in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Nash offers no principled reason why this settled jurisprudence ought now be rejected.

A. Nash Asserts an Economic Interest, Not a Liberty Interest.

The Court below correctly determined that no fundamental personal liberty interest requiring application of strict scrutiny was at issue in this case. J.S. A-8. Appellant's claimed liberty interest is as follows: A landlord is constitutionally entitled to cease doing business by evicting tenants and demolishing the building, and still hold the land for speculative purposes. Thus, the purported liberty interest is not simply the right to cease the business of being a landlord. It is that alleged right in conjunction with the right to retain the underlying land and speculate in its appreciation through change of use.[10]

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[9]Nash concedes the public purpose of providing rental housing. J.S. A-12. The State Legislature has deemed preservation of rental housing to be a paramount goal in California, the responsibilty for which is borne by both state and local agencies. See J.S. A-8 n.5.

[10]Nash's expectation that his land will substantially appreciate if left bare assumes the ability to change its use.

This is a classic property right and well within this Court's description of property as "the group of rights inhering in the citizen's relation to the physical thing." *United States v. General Motors*, 323 U.S. 373, 378 (1945). Thus, in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), this Court ruled that a zoning ordinance:

> assailed on the grounds that it is in derogation of §1 of the 14th Amendment to the Federal Constitution in that it deprives . . . liberty and property without due process of law [272 U.S. at 370] . . . must nevertheless be sustained unless its provisions are clearly arbitrary and unreasonable, having no substantial relation to the general health, safety, morals or general welfare. 272 U.S. at 384-85.

Attempts to alter this balance and impose a more exacting standard by injecting other constitutional claims into what are principally land use cases have been uniformly rejected. See, e.g., *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974) (association); *American Communications Ass'n v. Douds,* 339 U.S. 382 (1950) (exercise of religion); *Construction Industry Association v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976) (travel); *Agricultural Labor Relations Bd. v. Superior Court,* 16 Cal.3d 392, 546 P.2d 687, 128 Cal.Rptr. 183 (1976) (right to exclude others).

Where, under the guise of the zoning power, government purports to regulate expression or other First Amendment rights, a greater justification may be required. *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981); *Moore v. East Cleveland,* 431 U.S. 494 (1977). However, regulations that restrict the use of land do not invoke heightened analysis merely because they incidentally affect preferred

rights. *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974); *Grosz v. City of Miami Beach,* 721 F.2d 729 (11th Cir. 1983); *Associated Homebuilders of the Greater Eastbay, Inc. v. City of Livermore,* 18 Cal.3d 582, 557 P.2d 473, 135 Cal.Rptr. 41 (1976). Nash's liberty interests could be implicated only if he lacks viable alternatives respecting his property. *See post* at 15-16.

The California Supreme Court has ruled time and time again that the rental of property for housing purposes is a business that is appropriately addressed through the local police power. *Marina Point Ltd. v. Wolfson,* 30 Cal.3d 721, 640 P.2d 115, 180 Cal.Rptr. 496 (1982); *Fisher v. City of Berkeley,* ___ Cal.3d ___, ___P.2d ___, ___ Cal.Rptr. ___ (No. S.F. 24675, filed December 27, 1984). In these and similar cases, the California courts have followed the "rational basis" test consistently applied to economic regulations by this Court. *See Nebbia v. New York,* 291 U.S. 502 (1934). This approach was followed by the majority below; the reasoning of Justice Grodin (J.S. A-8) is sound and firmly in line with decades of well-developed authority.

Although Nash has repudiated any claim that his property has been taken (J.S. A-5, 12, 15, 23, and B-4 n.3), in actuality that is the gravamen of his complaint. Such a claim must fail here as it did in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) and in *Fresh Pond Shopping Center v. Callahan,* ___ U.S. ___, 104 S.Ct. 218 (1984). Thus, if Nash has no taking claim, he has no claim at all.

B. Regulating Nash's Ability to Freely Demolish Does Not Constitute a Taking of his Property.

When an owner of property uses it in a way that affects the public interest, it is subject to regulation that, even if it interferes with the full enjoyment of the property, is not a taking. *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978).

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), this Court held that regulation under the police power that goes further than necessary for the public welfare would be recognized as a taking. In recent cases, the Court has focused on the character of the governmental action and the extent to which that action interferes with the property owner's reasonable expectations. *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 124 (1978), *Andrus v. Allard,* 444 U.S. 51, 65 (1979). *See, Pruneyard Shopping Center v. Robins,* 447 U.S. 74 (1980) (a taking of one stick in the bundle of property rights does not constitute a "taking" in the constitutional sense).

Here too, appellant is restricted in his manner of disposing of property. He cannot demolish without first obtaining a permit and meeting necessary criteria. One of his "sticks" may be shortened. But, the rest of the rights inhering in the ownership of property remain intact. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Most notably, he has the right to personal use,[11] the right to fair rents, and the right to sell the property

Appellees do not deny that Section 1803(t) may preclude some alternative development of Nash's property. But that has never been sufficient to invalidate economic or land use regulations. *See, Kirby Forest Ind. v. United States,* ___ U.S. ___, 81 L.Ed.2d 1, 14 (1984) ("even a substantial reduction in the attractiveness of the property to potential purchasers does not entitle the owner to compensation"); *Penn Central Transp. Corp. v. New York City,* 438 U.S. 104, 130 (1978) ("[in]ability to exploit a property interest" is not a taking); *Troy Ltd. v. Renna,* 727 F.2d 287, 300 (3d Cir. 1984) (New Jersey's

[11] Nash may evict a tenant so he or a relative may occupy the unit. City Charter §1806(h). J.S. F-25.

eviction ban providing life tenancies for senior citizens was not a taking since fair rents were guaranteed).

C. There is No Thirteenth Amendment Right Implicated Here.

Cases considering the Thirteenth Amendment focus on an element of compulsion without alternatives. The Amendment only prohibits "superior and overpowering force, constantly present and threatening" compelling continued service. *United States v. Shackney,* 333 F.2d 475, 485-86 (2d Cir. 1964). If there is any alternative, even if it "may entail consequences that are exceedingly bad," a Thirteenth Amendment claim will be defeated. *Id.*

Thus, in *Flood v. Kuhn,* 316 F.Supp. 271 (S.D.N.Y. 1970), *aff'd* 443 F.2d 264 (2d Cir. 1971), *aff'd* 407 U.S. 258 (1972), the District Court rejected a Thirteenth Amendment challenge to baseball's reserve system, although it effectively denied a baseball player's freedom throughout his career to choose his employer. Noting that a player had the right to retire and embark on a new enterprise outside baseball, the court observed that "the financial loss [Flood] might thus sustain may affect his choice, but does not leave him with 'no way to avoid continued service.'" 316 F.Supp. at 281 (citation omitted). *See, Williamson v. Vardeman,* 674 F.2d 1211, 1214 (8th Cir. 1982) (rejecting Thirteenth Amendment challenge to compulsory service by attorneys to indigent defendants).[12]

1. Nash May "Go Out of Business."

If the Santa Monica law compelled Nash to remain a landlord without alternatives, it might be appropriate to strictly scrutinize the regulation. But this is not the case. Nash is simply precluded from taking one particular route

[12]The Eighth Circuit also dismissed a due process claim that services were taken without just compensation. 674 F.2d at 1214. No such analysis is necessary here since Nash admits he is being fairly compensated.

"out of the business." He may sell the property and invest his capital and resources elsewhere. But his right to go out of business does not encompass a right to change use.

Nash's land is zoned for multi-family residential use. As a practical matter, it can only be used for apartments or condominiums. There is no pretense that Nash would leave the land fallow indefinitely (constituting both a blight on the community and a burden on Nash). Therefore, Nash's purported "right to go out of business" is a feigned purpose underlying his desire to change use in order to maximize profit.

Appellant's principal cases, *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), and *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1972), do not support his argument for a fundamental right to go out of business. In these cases, a distinction was drawn between a right to cease business entirely and a "partial closing." Where the purpose of partial closing is invidious or designed to obtain an economic advantage not otherwise available, regulation is appropriate. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 275 (1965); *Robinson v. Diamond Housing Corp.*, 463 F.2d 853, 867 (D.C. Cir. 1972).

Here, although Nash has the "right to terminate his entire business" of being an investor in land, he pursues a "partial closing" with attendant economic benefit, *i.e.*, terminating one part of his business (renting apartments) and continuing the remaining part (speculation in land for appreciation and future development). This "right" is precisely what this Court refused to countenance in *Darlington*.

Thus, one cannot fashion the "right to go out of business" in any convenient manner. Appellant may go out of business, but he cannot retain rights and avoid responsibilities that are associated with that business. *See,*

Ashland Oil Co. v. Federal Energy Adm., 389 F.Supp. 1119 (N.D. Cal. 1975) (no right to continue receiving oil allocations after ceasing business); *Shapiro Bros. Shoe Co., Inc. v. Lewiston-Auburn Shoe Workers Protective Ass'n.*, 320 A.2d 247 (Me. 1974) (upholding law restricting plant closure); *People v. Greene*, 264 Cal.App.2d 774, 70 Cal.Rptr. 818, 821 (1968) (dam owner cannot simply "cease to operate his dam, abandon his work, and do nothing"). Nash may cease being a landlord, but he may not do so and still be a land speculator.[13]

2. Nash Has Several Viable Alternatives.

Nash has more options than did the property owners in *Hawaii Housing Authority v. Midkiff*, ___ U.S. ___, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). There, this Court upheld the Hawaii Land Reform Act which required, in essence, a forced sale of a landowner's property to his tenants. *See* 81 L.Ed.2d at 192. Yet, Nash is neither precluded from alienating his property to whomever he wants nor forced to endure continued contact with tenants.[14]

As the California Supreme Court observed (J.S. A-6-7), Nash has several viable alternatives to the "personal service" he apparently abhors. He may sell his property at fair value; he may hire a professional property management service to insulate himself from the tenants[15]; or he

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[13]Appellant freely admits that he seeks to demolish in order to speculate that the land will appreciate. See Nash's Response Brief in the California Court of Appeal at 3, 21; *ante* at 3.

[14]The existence of viable alternatives is also relevant for a taking analysis. *See Maher v. City of New Orleans*, 516 F.2d 1051, 1066 (5th Cir. 1975) ("Maher did not show that the sale of the property was impracticable, that commercial rental could not provide a reasonable rate of return, or that other potential use of the property was foreclosed").

[15]Indeed, appellant has apparently done just that. The Rent Control Board's records show Nash's property to be managed by Nashland Properties, Inc., a California corporation. Nashland also manages other rental property in Santa Monica.

may empty his building through attrition. Indeed, Nash could sell just his building and lease the underlying land,[16] which would accomplish his ostensible goal of going out of the landlord business while holding the land as an investment.

Moreover, under a recent amendment to the City Charter, Nash may convert the building to condominiums by selling the units to consenting tenants. Under City Charter Section 2007, a "Tenant-Participating Conversion" is exempt from the strictures of Section 1803(t).[17] Thus, Nash today has even more alternatives than he did when the cause was argued below.

Nash does not explain why resort to the options described above is an unconstitutional deprivation of personal liberties.[18] Admittedly, these options might not realize maximum profit for Nash. If that is the gravamen of his complaint, and appellees contend that it is, then the basis of this lawsuit — fundamental personal liberties — is contrived as an end run around traditional due process analysis. His suggestion that appellees force him to transfer his property is devoid of reason or factual support. Section 1803(t) is not concerned with ownership or transfer of the property. *See Santa Monica Pines v. Santa Monica Rent Control Board,* 35 Cal.3d 858, 679 P.2d

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[16]This appears to have been a prevailing practice in Hawaii prior to the Land Reform Act. *See Hawaii Housing Authority v. Midkiff,* 81 L.Ed. 2d at 192.

[17]This Charter Amendment specifically supercedes the condominium conversion moratorium referred to by the Court of Appeal. J.S. B-5 n.5. The Tenant-Participating Conversion process may be seen as providing Nash with a remedy additional to the removal permit process, which Nash unilaterally abandoned. Thus, Nash has less excuse for failure to exhaust such remedies now than he did when the case was filed five years ago.

[18]He claims only that sale is not guaranteed to bring fair market value (J.S. at 9). Even if that argument were germane, his fears would have to find factual support in the record. They do not.

27, 201 Cal.Rptr. 593 (1984) (upholding Section 1803(t) as not interfering with state created rights to subdivide and sell property as condominiums). Nash is free to keep his land or sell it as he chooses. However, his *right* and *ability* to sell defeats his argument that he is forced to remain in the landlord business.

3. Nash Has Treated this Property as a Typical Investment; His Ownership of Rental Housing Does Not Require Personal Service.

A claim similar to that raised by Nash was rejected by Justice Holmes in *Marcus Brown Co. v. Feldman*, 256 U.S. 170 (1921):

> It is true that the traditions of our law are opposed to compelling a man to perform strictly personal services against his will even when he has contracted to render them. But the services in question although involving some activities are so far from personal that they constitute the universal and necessary incidents of modern apartment houses. *Id.* at 199.

Accord, Marquam Investment Corp. v. Beers, 615 P.2d 1064, 1071 (Or. App. 1980).

It is undeniable that the owner of rental property is exposed to tort liability for harm caused to inhabitants and visitors. This is a business risk equivalent to that borne in other businesses.[19] It does not alter the economic nature of the rights involved.

Nash purchased the building as an investment. J.S. at 4. He does not live in it and "plans to hold it, in the manner

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[19]Indeed, Nash cannot avoid tort liability by leaving his land fallow. *See Sprecher v. Adamson Properties*, 30 Cal.3d 358, 636 P.2d 1121, 178 Cal.Rptr. 783 (1981).

typical of personal or corporate investors in real estate, i.e., purely as a form of economic investment." J.S. A-11 n.6.[20] He earns a return, both from the income stream produced by rentals and from normal appreciation of the underlying land, If the land turns out to be worth less than he thought it would, and he does not realize the gain he had hoped for, or even if he loses money on sale, his cause of action lies under the takings clause. *Agins v. City of Tiburon,* 447 U.S. 255 (1980).

D. Demolition Controls Do Not Abridge Fundamental Rights.

Appellees are unaware of any case that holds a landowner has a fundamental right, whether grounded in the Thirteenth Amendment or elsewhere, to demolish structures. Rather, demolition controls have been sustained as valid exercises of the police power. *See, e.g., Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978); *Maher v. City of New Orleans,* 516 F.2d 1051 (5th Cir. 1975).

Demolition restrictions have also withstood claims they abridged fundamental constitutional rights. *See Society for Ethical Culture v. Spatt,* 68 App.Div.2d 112, 416 N.Y.S.2d 246 (1979), *aff'd* 51 N.Y.2d 449, 434 N.Y.S.2d 932, 415 N.E.2d 922 (1980) (landmarks preservation law did not interfere with the free exercise of religion); *Lafayette Park Baptist Church v. Board of Adjustment of City of St. Louis,* 599 S.W.2d 61, 66 (Mo.App. 1980) (historic district ordinance restricting demolition of church property is essentially a zoning ordinance).

The class of fundamental rights is not casually enlarged. *Seaone v. Ortho Pharmaceuticals, Inc.,* 660 F.2d 146, 149 (5th Cir. 1981). It includes only those rights "explicitly or implicitly guaranteed by the Constitution." *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 33-34

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[20]The court below also noted that this particular parcel has no sentimental or other special meaning to Nash. J.S. A-11 n.6.

(1973). Thus in a parallel context the Fifth Circuit declined to find a "fundamental right" to alienate real property. *National Western Life Ins. Co. v. Commodore Cove Improv. Dist.*, 678 F.2d 24, 26 (5th Cir. 1982); *cf., Andrus v. Allard*, 444 U.S. 51 (1979).

In the final analysis, demolition controls are no different than other land use and economic regulations. To insist on a "compelling" justification for them is to require re-examination of numerous other restrictions on property long thought to be valid exercises of the police power. The Fifth and Fourteenth Amendments adequately protect rights in property; searching for preferred status in the penumbra of the Thirteenth Amendment embarks on a new and dangerous course.

CONCLUSION

Nash's theory is unprecedented. Not only does it repudiate *Penn Central* and *Fresh Pond*, it wholly discards the rational basis test in favor of strict scrutiny of economic regulation, a test until now reserved for cases genuinely inhibiting fundamental liberties. Although Nash seeks to set a dramatic precedent applicable to price and land use regulations generally, it is inappropriate for the Court to reexamine the rational basis test in this case and on this record, particularly since the decision below rests on adequate and independent state grounds. It is respectfully requested that this motion be granted and the appeal dismissed for lack of a substantial federal question.

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State of California

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County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on February 15, 1985, I served the within *Motion to Dismiss* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

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I declare under penalty of perjury that the foregoing is true and correct. Executed on February 15, 1985, at Los Angeles, California.

Robin McColgan
(Original signed)

Office - Supreme Court, U.S.
FILED
JAN 4 1985
ALEXANDER L. STEVAS
CLERK

(3)

No. 84-1168

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

JEROME J. NASH,
Appellant,
vs.
CITY OF SANTA MONICA, et al.,
Appellees.

On Appeal From the Supreme Court of The State of California

REPLY BRIEF

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JEROME J. NASH,
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Appellees.

On Appeal From the Supreme Court of The State of California

REPLY BRIEF

Appellant Jerome J. Nash ("Nash") herein briefly responds to the Motion to Dismiss filed by Appellees Santa Monica Rent Control Board and City of Santa Monica (collectively referred to herein as "City").

A.

THE CITY'S MOTION MISSTATES THE ISSUES.

1. This Is Not An Action Seeking Demolition Approval.

In its attempt to characterize this action as nothing more than a challenge to an ordinary local "land use" regulation, the City has erroneously contended that Nash is seeking to demolish his apartment building. That is not correct. Mr. Nash wishes to cease engaging in the landlord business in Santa Monica. Full relief in this

action could be accorded Nash by permitting him to evict the tenants and vacate the building. Whether the building would remain vacant or could then be demolished is not at issue in this litigation.

2. The Constitutional Issues Raised Herein Are Important.

The significance and practical importance of the constitutional issues raised by this case can be understood through consideration of the simple hypothetical of a town wherein (say) a Chrysler automobile assembly plant is located. In the face of a public concern that Chrysler will close the plant with the resulting loss of hundreds of local jobs, the town passes a law that the property upon which the assembly plant is located must at all times be used for the assembly of automobiles.

In response to a contention by Chrysler that it has the absolute right to close the plant, the town asserts that the preservation of its employment base serves a clear public purpose and that, in any event, Chrysler is not being forced to remain in business or to continue operating the plant, since it is always free to sell the plant to Toyota, Ford, or General Motors. Until Chrysler does find a buyer, however, it must continue to operate the plant. Just as in the present case, the town argues that the law is only one of local land use regulation, of little or no federal significance.

There is no distinction between the application of the Constitution to the hypothetical and to the instant case. If Chrysler's constitutional rights would be denied in the hypothetical, then Nash's constitutional rights are being denied in the instant case. Reading the City's Motion to Dismiss filed herein, one finds that the Motion could substitute equally well, line by line, citation by citation, argument by argument, as a motion to dismiss filed by the town in the hypothetical.

The federal significance and practical importance of the issue as illustrated by the hypothetical cannot be denied. The consequences would be obvious if local governments were allowed — under the guise of regulating land use pursuant to their local police power — to hold hostage businesses which offer local employment. These consequences cannot be said to be unimportant.

3. The Constitutional Issues Are Unresolved.

The thrust of the City's Motion to Dismiss is not so much a contention that the fundamental rights involved in this appeal are unimportant, but rather a contention that the legal issues raised in this appeal have already been resolved in previous cases, such as *Fresh Pond Shopping Center v. Callahan*, ____ U.S. ____, 104 S. Ct. 218 (1983); and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

As set forth in Nash's Jurisdictional Statement, none of the cases purportedly relied upon by the City dispose of — or even address — the issue raised in this case. The only time this Court had addressed the issue raised herein, the Court was appalled at the suggestion that a government might force a private owner to remain in business against his will. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 270 (1965). Only by misstating the case as being one of demolition controls, can the City even colorably describe the issues raised in this action as being settled law.

4. This Is Not A Historic Preservation Case.

In its attempt to shoehorn this action into the general rubric of "local land use," the City references the historical preservation cases. In fact, the City even contends that consideration of this appeal would call "into question historic preservation legislation enacted by all 50 states and

by over 500 municipalities." The City's purported concern is unfounded. As set forth earlier, Mr. Nash is not seeking by this action to demolish his property which, incidentally, does not have the slightest historical or architectural importance.

Through its law, the City is not in any way attempting to preserve Mr. Nash's building. The building itself has no intrinsic value to the City and is not the real subject of this action. Rather, the real subject of this action is an attempt by the City, under the purported veil of "local land use," to compel Mr. Nash to engage in a certain business within the building. None of the land use cases cited by the City deal with this issue.

5. Even Land Use Regulations May Be In Violation Of Personal Constitutional Liberties.

Even if the instant case were to fall within the general rubric of "land use," it does not follow, *a fortiori,* that the regulation is a valid exercise of the local police power. Regulations enacted under the guise of land use can significantly violate personal rights guaranteed under the Constitution. If a local government enacts land use regulations to economically compel its citizens to forego their constitutional rights, then the regulations must be declared invalid, whether they are viewed as "land use" or otherwise. A government can as surely deprive its citizens of their constitutional rights by the threat of loss of their investments, as by the threat of incarceration.[1]

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[1]In the instant case, the threat is of both – Nash would be guilty of a misdemeanor if he ceased using his property for the residential rental business.

B.

THE CONSTITUTIONAL ISSUES ARE PROPERLY BEFORE THIS COURT.

In contending that this appeal should be dismissed on procedural grounds, the City misstates both the record and the nature of the grounds for dismissal.

1. Federal Constitutional Issues Are Involved And Were Timely Raised And Decided.

There are certainly federal constitutional rights at issue in this action. That fact was acknowledged by the California Supreme Court in its decision wherein it noted that the right to go out of business emanates from the Thirteenth Amendment of the United States Constitution.[2] J.S. at A-6.

Among its other contentions, the City argues that the trial court's decision was not based on any supposed liberty interest, thereby allegedly justifying dismissal of the action by this Court on the grounds that the constitutional issues were not timely raised and considered. The City is simply in error in this assertion. One of the stated and express grounds for the trial court's decision was

> Petitioner is constitutionally entitled not to be compelled to sell the Building as the only means of terminating his Business and removing himself and his property from under the Board's regulatory jurisdiction. J.S. at C-7.

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[2]Nash contends that such right is also guaranteed by the Fourteenth Amendment.

2. Nash's Federal Rights Are Not Protected Under Independent State Grounds.

The most interesting argument for dismissal raised by the City is that, since the California Supreme Court purportedly interprets the California Constitution more liberally than this Court interprets the United States Constitution,

> . . . it would be anomalous for this Court to find Nash's purported liberty interest protected by the Thirteenth Amendment after his claim based on the 'heightened' protections of the California Constitution has been rejected.

Motion to Dismiss, at p. 7, n. 6.

In other words, the City is arguing that this Court need not waste its time considering appeals from California since it is purportedly well-established that the federal constitutional rights of Californians are better protected by the California courts than by this Court.

CONCLUSION

For the foregoing reasons, Nash respectfully requests that the Motion to Dismiss be denied and that this Court note probable jurisdiction.

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